# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 158

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SPRING RIVER STONE COMPANY.

IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

FILED APRIL 26, 1913.

(23,658)

(23,658)

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a In the Springfield Court of Appeals of Missouri, October Term, 1912.

No. —.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
vs.
SPRING RIVER STONE COMPANY, Respondent.

*Appellant's Abstract of the Record.*

S. H. West, Roy F. Britton, McReynolds and Halliburton, Attorneys for Appellant.

Filed Sep. 6, '12. Mitchell, Clerk.

1 In the Springfield Court of Appeals of Missouri, October Term, 1912.

No. —.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
vs.
SPRING RIVER STONE COMPANY, Respondent.

Appealed from the Circuit Court of Jasper County, Missouri.

*Appellant's Abstract of the Record.*

Appellant filed in the office of the Clerk of the Circuit Court of Jasper County, Missouri, returnable to the February Term, 1911, of said Court, its petition against Spring River Stone Company, the respondent, to recover the sum of Three Hundred Twenty-three Dollars and twelve cents, with interest thereon at the rate of six per cent. per annum, from August 9, 1910, said sum representing the balance due on freight charges for shipments made over the line of
2 appellant and its connecting carriers. Summons was duly issued and served on the respondent, returnable to said February Term of Court.

At the said February Term of said court the defendant filed answer to said petition and in due time plaintiff filed its reply thereto.

On this petition, answer and reply a trial was had on the sixth day of March, 1912, and on that day, at the conclusion of the plaintiff's testimony, by direction of the Court, the jury returned a verdict in favor of the defendant, and after an unsuccessful motion for a new trial, said plaintiff duly appealed the cause to this court.

All pleadings and other papers filed in said cause, and hereinafter set out either in the abstract of the record proper or the abstract of

the bill of exceptions, are captioned as the petition hereinafter set out is captioned and were properly signed by counsel filing them. All record entries hereinafter set out are likewise so captioned and all such captions and signatures, except the caption of said petition, will be omitted.

3 *Abstract of the Record Proper.*

## Pleadings.

In the Circuit Court of Jasper County, Missouri, February Term, 1911.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff,
vs.
SPRING RIVER STONE COMPANY, Defendant.

### *Amended Petition.*

Now comes the Plaintiff and for its amended petition herein states that the plaintiff is a corporation, duly incorporated and doing business under the laws of the State of Texas, and is engaged in the transportation of freight and passengers and inter-state transportation.

That the defendant is a corporation, duly incorporated and doing business under the laws of the State of Missouri, and engaged in the business of quarrying, shipping and selling stone.

That the defendant, on December 1, 1908, shipped from Carthage, Missouri, by way of St. Louis & San Francisco Railroad, a carload of stone, consigned to J. B. Hoffman, Fort Worth, Texas, by way of Monett, Missouri, and Jonesboro, Arkansas, and thence over the road of the St. Louis Southwestern Railway Company of Missouri and the St. Louis Southwestern Railway Company of Texas, in C. S. N. O. & P. car No. 94134.

That on December 4, 1908, the defendant shipped over the St. Louis & San Francisco Railroad, by way of Monett, Missouri,
4 and Springfield, Missouri, and Jonesboro, Arkansas, thence over the road of the St. Louis Southwestern Railway Company of Missouri, and the St. Louis Southwestern Railway Company of Texas, a carload of stone, on C. of G. A. car No. 9193, consigned to J. B. Hoffman, of Fort Worth, Texas, from Carthage, Missouri.

That on December 5, 1908, the defendant shipped from Carthage, Missouri, a carload of stone over the St. Louis & San Francisco Railroad, by way of Monett and Springfield, Missouri, and Jonesboro, Arkansas, thence over the road of the St. Louis Southwestern Railway Company of Missouri and the St. Louis Southwestern Railway Company of Texas, consigned to J. B. Hoffman, Fort Worth, Texas, on [illegible] car No. 25096.

That on December 19, 1908, the defendant shipped a carload of stone from Carthage, Missouri, over the St. Louis & San Francisco Railroad, by way of Monett and Springfield, Missouri, and Jones-

boro, Arkansas, thence over the road of the St. Louis Southwestern Railway Company of Missouri and the St. Louis Southwestern Railway Company of Texas, consigned to J. B. Hoffman of Fort Worth, Texas, on M. & N. O. car No. 1110.

That on December 30, 1908, the defendant shipped a car of stone from Carthage, Missouri, over the St. Louis & San Francisco Railroad, by way of Monett and Springfield, Missouri, and Jonesboro, Arkansas, thence over the road of the St. Louis Southwestern Railway Company of Missouri and the St. Louis Southwestern Railway Company of Texas, consigned to J. B. Hoffman at Fort Worth, Texas, in St. L. & S. F. car No. 93997.

That the shipments in question were from the State of Missouri, through the State of Arkansas into the State of Texas, and therefore were interstate shipments, and that under the Act of Congress of the United States, entitled "An act to Regulate Commerce" approved February 4, 1887, and the Acts amendatory thereof and supplementary thereto, it is the duty of the plaintiff as the delivering carrier to collect the charges which are set forth in the tariff, which was on file with the Interstate Commerce Commission, and it was the duty of the defendant to pay the rates as charged therein, and the refusal of the defendant to pay, and of the plaintiff to collect said charges would be a violation of said Act of Congress of the United States, and subject each to indictment and punishment.

That at the date of the said shipments, item 54, page 47, Texas Tariff 42-B, I. C. C. 524, issued by Mr. F. A. Leland, agent Southwestern Tariff Committee, St. Louis, Missouri, effective August 10, 1908, provided that the minimum weight of stone between points on the St. Louis and San Francisco Railroad, and also on shipments originating at points on that line and destined to points on its connections would be the marked capacity of the car; that the marked capacity of said cars was as follows: C. S. N. O. & P. Car No. 94134; L. & N. Car No. 25096; M. & N. A. Car No. 1110 (88,000); St. L. & S. F. Car No. 93997 was each 80,000 pounds, and the marked capacity of C. of G. A. Car No. 9193 was 60,000 pounds, making a total marked capacity of the five cars 388,000 pounds, and under the law and rulings of the Interstate Commerce Commission, it was the duty of the plaintiff to collect at destination on 388,000 pounds at 27½ cents per hundred pounds making a total amount that should have been collected $1067.00.

That by mistake of the agent of plaintiff at Fort Worth, Texas, only $1014.48 was collected, instead of $1067.00 thereby making an undercharge of $30.52; that defendant made a claim upon plaintiff for the overcharge on said car loads of stone, of $287.78, said claim for overcharge being based on an error of weight, which claim was afterwards amended by the defendant to $263.73, being based on scale weights taken by the St. Louis & San Francisco Railroad Company at Monett, their scale weights being 273,000 pounds.

That plaintiff's agent by oversight and mistake, and a misunderstanding of the tariff for hauling stone, authorized defendant to

draw on plaintiff for $270.60, said mistake being made by
6 using the minimum weight of 50,000 pounds per car, which under the Interstate Commerce Law and the rulings of the Interstate Commerce Commission and the tariff rates as posted, neither the plaintiff nor its agents had authority to do.

That the undercharge being the amount that plaintiff's agent failed to collect from defendant, and the alleged overcharge refunded to defendant and received by defendant, of $270.60, makes a total of $323.12 that is justly due the plaintiff from the defendant.

Plaintiff further states that, under the Act of Congress regulating interstate commerce, approved February 4, 1887, and the acts amendatory thereto, and the acts supplemental thereto, the only rate and minimum weight that could be collected on shipments is the rate and minimum weight provided, in Current Tariffs on file with the Interstate Commerce Commission; that there is on file with the Interstate Commerce Commission a Current Tariff, as above set out, in which item 54 of the Texas Tariff 42-B, I. C. C. 524, provided that the minimum weight on stone between points on the Frisco or one routed via that line would be the marked capacity of the car, and under the law and the rulings of the Interstate Commerce Commission, the St. Louis Southwestern Railway Company of Missouri and the St. Louis Southwestern Railway Company of Texas, are compelled to assess charges according to the above tariff, and have no right, power or authority to charge or collect any less than the amount provided to be charged or to collect any less than the amount provided to be collected by said Tariff; and on the minimum weights provided by said tariff, neither had the plaintiff any right or authority, under the law, to refund to the defendant any part of the money so collected on the shipment of said stone, unless the minimum weight of the capacity of the cars was less than the amount charged for.

By reason of the above stated facts, plaintiff says that the defendant owes and is indebted to the plaintiff in the sum of $323.12;
7 that plaintiff demanded said amount of the defendant, and the defendant, on August 9, 1916, refused and declined to pay plaintiff said amount.

Wherefore plaintiff asks judgment against the defendant for the sum of $323.12, with interest thereon at the rate of six per cent. per annum, from August 9, 1910, and for such other orders and judgments as may be proper in the premises.

S. H. WEST AND
McREYNOLDS & HALLIBURTON,
*Attorneys for Plaintiff.*

***Answer.***

Defendant's answer to said petition was filed in due time and is as follows, to-wit:

Now comes the defendant and, for amended answer to the plaintiff's amended petition herein, denies each and every allegation therein contained.

Further answering said amended petition, defendant avers that on the — day of ——, 1908, the defendant being about to make a bid on furnishing certain stone for use in building a certain structure in Fort Worth, Texas, and being desirous of ascertaining the freight rate for shipment of such stone, inquired of the plaintiff's duly authorized commercial agent as to the freight rate from Carthage, Missouri, to Fort Worth, Texas, on said stone, provided same was shipped over the St. Louis and San Francisco Railroad Company and the plaintiff's lines of railroad; that thereupon, it was agreed between the plaintiff's agent and this defendant that said rate should be 27½ cents per hundred pounds, with 50,000 pounds minimum car capacity; that in pursuance of such agreement, defendant made the contract for furnishing said stone for said purpose at Fort Worth, Texas, basing its price for said stone at a low figure in consequence of the freight rate thus agreed upon between plaintiff and defendant; that thereafter this defendant in shipping said stone called upon the initial carrier, the
8 St. Louis and San Francisco Railroad Company, and requested the railroad company to furnish cars of minimum capacity of 50,000 pounds, and the defendant says that if any cars were furnished by the said railroad company of a capacity in excess of 50,000 pounds it was done for the convenience of the said carrier and not as ordered by this defendant, and that in consequence thereof, and by virtue of the tariff sheets and freight rates duly in force governing such shipments, the defendant did not become liable for freight on the marked capacity of any car furnished, but became liable only for freight on the minimum capacity of 50,000 pounds on each car provided that if the actual weight exceeded said 50,000 pounds the defendant would become liable for such excess at the rate aforesaid.

Defendant further says that thereafter, notwithstanding the premises and the agreement and provisions hereinbefore stated the agent of the plaintiff at Fort Worth, Texas, wrongfully collected of this defendant as freight on said shipments a sum of money many hundreds of dollars in excess of the correct amount of freight which the plaintiff was entitled to collect; and that thereafter a controversy arose between this defendant and the plaintiff as to the overcharge so made as aforesaid by said agent of plaintiff at Fort Worth, Texas, and as to the damages sustained by this defendant in consequence thereof, and in order to settle said controversy the plaintiff paid to defendant the sum of Two Hundred and Seventy-Dollars and six cents ($270.06), which sum was paid by plaintiff to this defendant in full compromise and settlement of the defendant's claims against plaintiff for damages and overcharge and of the plaintiff's claim against defendant for freight charges on said shipments of stone.

Wherefore, defendant says that plaintiff ought not to have and maintain this action and defendant, therefore, prays to be hence dismissed with its costs.

THOMAS & HACKNEY,
*Attorneys for Defendant.*

9 Plaintiff's reply to said amended answer was filed in due time and is as follows, to-wit:

Now comes the plaintiff and for reply to the amended answer of the defendant herein, admits that it was agreed between plaintiff's agent and defendant that the rate per hundred pounds should be 27½ cents, with a minimum amount of 50,000 pounds per car.

Admits that plaintiff's agents on a claim of rebate by defendant, paid to the defendant $270.05, but says that said payment was made by plaintiff's agent in violation of law, and was unlawfully and illegally paid by plaintiff's agent to defendant, and the defendant has no right under the law to retain the same, and denies each and every other allegation in defendant's said answer contained.

S. H. WEST AND
McREYNOLDS & HALLIBURTON,
*Attorneys for Plaintiff.*

The trial of said cause was had on March 6, 1912, in the Jasper County Circuit Court, second division thereof, before Honorable D. E. Blair, judge of said court, and a jury, and at the conclusion of the plaintiff's testimony the jury, at the direction of the court, found a verdict for the defendant and final judgment was rendered thereon as appears on the record entries made in such cause, as follows:

*Record Entry of March 6, 1912.*

Now, at this day, this cause comes for trial, the plaintiff appears by S. H. West and McReynolds & Halliburton, its attorneys, the defendant appears by Thomas & Hackney, its attorneys, and both parties announce ready for trial, whereupon comes the following panel of jurors, to-wit:

W. A. Glazebrook, I. R. Bowbell, J. J. Seymour, J. W. Weaver, Clint Swartz, Will Craig, Howard Batis, S. E. Cooley, C. Sigler, John Bowers, W. C. Campbell, Henry Shelton, twelve good and
10 lawful men, resident citizens of Jasper County, Missouri, and qualified by law to serve as jurors, who are duly impaneled, sworn and charged and the trial of this cause is begun. At the conclusion of the plaintiff's testimony, by direction of the Court, the jury returned the following verdict, to-wit:

"We the jury, find the issues in favor of the defendant."

WILL CRAIG, *Foreman.*

It is, therefore, ordered and adjudged by the court that the plaintiff take nothing by its suit herein; that the defendant be discharged and go hence without day and recover all and from the plaintiff the cost of this cause and that execution issued therefor.

*Record Entry, March 8, 1912.*

Plaintiff files motion for new trial.

*Record Entry, March* 9, 1912.

Now comes on for hearing plaintiff's motion heretofore filed herein for a new trial in this cause. By consent said motion is taken up and being by the court seen, heard and fully understood, the same is overruled.

Now comes the plaintiff and files herein its affidavit for an appeal in this cause. Said affidavit being by the court examined and deemed sufficient, an appeal in this cause is granted to the Springfield Court of Appeals, the plaintiff having deposited the Ten Dollars Docket fee in said Court required by law.

It is ordered by the court that the plaintiff be permitted to file herein its bill of exceptions in this cause on or before the third day of the June Term, 1912, of the court.

*Record Entry, April* 13, 1912.

Now, on this 13th day of April, 1912, comes the plaintiff herein before the Clerk in vacation and files its bill of exceptions
11 in this cause which has been signed and sealed by the Honorable D. R. Blair, Judge of division No. 2 of this court, and made a part of the record herein.

Attest:

DELLA A. SHARPE, *Clerk.*

By JAMES M. BURKE, *D. C.*

More than fifteen days before the return term of said cause in the Springfield Court of Appeals of Missouri, the appellant herein caused to be filed in office of said court by the Clerk of said Jasper County Circuit Court, a certified copy of the judgment appealed from in said cause, showing the term, month and year upon which the same was rendered, together with the order granting an appeal herein.

The end of the record proper.

12 *Bill of Exceptions.*

Said bill of exceptions, filed as aforesaid in said cause on the 13th day of April, 1912, is as follows, to-wit:

(The question to be determined on this appeal being whether or not the plaintiff was entitled to recover at all on the testimony adduced, we have not reduced the testimony to narrative form, but have set it out in full so that the court may consider its full effect.)

Be It Remembered, That upon the trial of the above entitled cause on the 6th day of March, 1912, the same being the 15th Judicial Day of the February Term, 1912, of said Circuit Court within and for the County of Jasper and State of Missouri, before the Honorable

David E. Blair, Judge of Division Number Two of said Court, and a Jury, the following proceedings were had in this cause, to-wit:

Appearances:

S. H. WEST,
ROY F. BRITTON AND
McREYNOLDS & HALLIBURTON,
*Attorneys for Plaintiff.*
THOMAS & HACKNEY,
*Attorneys for Defendant.*

The Plaintiff, to maintain the issues upon its part, introduced the following evidence, to-wit:

Mr. HALLIBURTON: We offer in evidence the Texas Tariff Number 42-B, issued by F. A. Leland, Agent, St. Louis, Missouri, Interstate Commerce Commission 524 certified to by Secretary of Interstate Commerce Commission with supplements numbers 3, 6, 7 and 8, showing the plaintiff here to be one of the issuing parties to said tariffs rates and supplements.

Mr. HACKNEY: Defendant objects because the document doesn't purport to have been filed by authority of the St. Louis & San Francisco Railroad Company or St. Louis and Southwestern Rail-
13 road Company and because for the further reason that only certain excerpts from the document are offered, and not all the rules and regulations regarding shipments.

Mr. HALLIBURTON: We offer these books. We expect to put before the jury only certain clauses. I want to state also that the books shows that the St. Louis & San Francisco Railroad is one of the issuing lines as well as the St. Louis and Southwestern Railroad Company of Texas.

Mr. HACKNEY: There is no evidence Leland was agent of either one of these lines and had any authority to file the rates with the Interstate Commerce Commission.

The COURT: Overruled.

Mr. HACKNEY: Additional objection is made that they are not offering all the rules relating to shipment of stone or question of rate where a small capacity car is ordered and a larger capacity is furnished.

The COURT: Overruled.

Mr. HACKNEY: Does the Court admit just part of the document?

The COURT: He stated he offered all of it.

Mr. HALLIBURTON: I have to. We don't want to read to the jury but a part of it.

Mr. HACKNEY: All that is pertinent to the question goes in under their offer?

Mr. HALLIBURTON: Yes, sir, no trouble about that, at all

Mr. HALLIBURTON: What I desire to read to the jury is item 54 on page 47. "Minimum weight will be the marked capacity of car on Stone, between points on St. Louis & San Francisco R. R.; also on shipments originating at points on that line destined to points on its connections.

Mr. HALLIBURTON: Now I read from supplement 6, Texas Tariff issued June 13, 1908, effective August 10, 1908.

Mr. HACKNEY: I think plaintiff in reading one paragraph is required to read the other paragraph on the question of the same subject.

Mr. HALLIBURTON: If there is any other paragraph.

14 Mr. HACKNEY: Item 81 on page 55 goes in on the question of the marking of the car.

Mr. HALLIBURTON: We will look at it and see. On page 169, supplement No. 6, I read from item 792 under the head of Kansas City Territory. Points taking Ft. Worth-Dallas group rates, reissues, effective September 10, 1908, "Stone: Building (not Granite or Marble), Flagging and Paving, rough quarried, sawed or dressed, including Artificial Moulded Stone (not polished, lettered or figured), and Stone crushed, minimum weight 50,000 pounds, 27½c.

Mr. HACKNEY: Read item 81.

Mr. HALLIBURTON: I am willing to read this too. "The following rule will be observed in assessing the freight charges for minimum weights, according to capacity of car. 'When carrier cannot furnish car of capacity ordered by shipper and for his own convenience provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum carload weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight. Capacity of car ordered, number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's way-bill.' In no case must shipment be billed at minimum weight of a car of less capacity than in service on initial line."

Mr. HALLIBURTON: Now I offer the territorial location.

Mr. HACKNEY: Object because it is not a copy of any document. It only purports to be a certificate by the Secretary of the Interstate Commerce Commission or alleged excerpt from some alleged document.

Mr. HALLIBURTON: I think that is all that is necessary to be. It covers the territorial location of Carthage. It shows what freight rate applies.

The COURT: Overruled.

Mr. HALLIBURTON: I will read this document.

"I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached
15 contains a true and correct extract from Page 48 of Territorial Directory No. 1, Geo. W. Cale, Agent, I. C. C. No. 496, filed with said Interstate Commerce Commission on August 6th, 1907.

And I further certify that said I. C. C. No. 496 was in force and effect during November and December, 1908.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission on this 27th day of January, A. D. 1911.

[SEAL.]

E. A. MOSELEY,
*Secretary of the Interstate Commerce Commission.*

16 Page 48.

| Stations. | Railroad Location. | Territorial Location. | | | |
|---|---|---|---|---|---|
| | | Texas, Mexico, Texarkana. | Arkansas. | | Oklahoma and Indian Territories. |
| | | | Fort Smith group. | All points except Ft. Smith group. | |
| Carthage, Mo..... | Frisco / St. L.-I. M. & S. ..... | Kansas City.. | Kansas City. | Kansas City.. | ..... |

17 HENRY C. JOHNS, sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

(Mr. HALLIBURTON:)

Q. Your name is Henry C. Johns?
A. Yes, sir.
Q. You live near Carthage?
A. Yes, sir.
Q. In 1908 you was connected with the Spring River Stone Company?
A. Yes, sir.
Q. President of it at that time?
A. Yes, sir.
Q. Now in 1908, Mr. Johns, you shipped five carloads of stone to J. B. Hoffman, Ft. Worth, Texas?
A. Yes, sir.
Q. Over the Frisco to Jonesboro, Arkansas, and over the plaintiff railroad company to Ft. Worth?
A. Yes, sir.
Q. You don't remember the number of those cars now?
A. No, sir.
Q. Now do you remember the full amount of freight you originally paid on those cars?
Mr. HACKNEY: That was paid in December.
A. No, not the exact amount; it has been four years ago.
Q. $1,014.48 wasn't it?
A. I suppose that was it.
Q. That is the correct amount as you have it at your office?
A. I suppose that is right, yes, sir.
Q. Now, Mr. Johns, I show you this letter from the office, whose signature is that, you say it ain't yours, it is your name.
A. Mr. Givens' I think.
Q. Signed by your authority?
A. I couldn't say that.
18 Q. You couldn't.
A. No, sir.
Q. You don't know whether your clerk signed your name to letters for you.
A. I don't run in the office every minute to authorize letters written.
Q. Had he general authority to sign up the correspondence?
A. He signed up the correspondence if I wasn't there, but I couldn't say I authorized that particular letter.
Q. I want to know whether he had general authority to sign letters in corresponding with people?
A. Yes, sir, he had charge of the correspondence.
Q. Your company did put in a claim for overcharge?
A. Yes, sir.
Q. And you collected back—do you remember the amount, Mr. Johns?

A. The amount paid us I think was $270.60.

Q. That is the amount you collected back from the plaintiff for what you claimed was an overcharge?

A. Yes, sir.

Q. Now, that was collected back, do you remember what date you got that from the railroad company?

A. No, sir, it came in the form of a draft through the bank.

Q. February 26, 1909, is that correct?

A. Yes, sir.

Mr. HACKNEY: It was probably paid here the day before.

Q. Have you got the original bills of lading, Mr. Johns?

A. No, sir.

Q. Have you got copies of them?

A. No, sir, unless they are in the office.

Q. All these letters Mr. Johns, written about this matter of refunding this alleged overcharge were signed by your name by Mr. Givens?

A. Yes, sir.

19 Q. In other words he done the corresponding and signing your name to it?

A. Yes, sir.

Q. And he was employed in your office then as bookkeeper and kind of a secretary?

A. Yes, sir.

Cross-examination.

(Mr. HACKNEY:)

Q. You are not now the owner of any interest in the Spring River Stone Company?

A. No, sir.

Q. You sold your interest in the corporation after the transaction complained of here?

A. Yes, sir.

Q. Do you know Mr. J. L. Marens, commercial agent of the plaintiff company?

A. Yes, sir.

Q. I show you a letter dated November 23rd, 1908, written to the Spring River Stone Company by Mr. Marens as commercial agent of the plaintiff company and ask you if that letter was received through the mail by your company?

A. Yes, sir.

Q. Had Mr. Marens been to Carthage previous to that time and interviewed you soliciting business for the company?

A. Yes, sir, several times.

Q. That letter bears date 23rd of November, had you had some correspondence regarding making a bid on some stone work in Texas prior to that time?

A. Yes, sir.

Q. With Mr. Hoffman?

A. Yes, sir.

Q. Mr. Hoffman is in business at Fort Worth, Texas?
A. Yes, sir.
20 Q. How much in quantity of stone and what was the character of the stone you were contemplating making a bid with Mr. Hoffman for delivery at Fort Worth?
A. Mr. Hoffman has a cut-stone yard at Fort Worth, Texas. We figured on stone in the slab to be delivered there. He was then cutting it and putting it in a building.
Q. Did you have a certain bid for a particular quantity?
A. He asked for a delivered price on five cars of stone.
Q. This was cut stone, you say, what is called the Carthage Lime Stone?
A. It is sawed stone.
Q. Do you know what a cubic foot of that stone weighs?

Mr. HALLIBURTON: Object as not being the proper way to get at this matter.
Mr. HACKNEY: We are showing the actual weight.
The COURT: I will hear it.
Mr. HALLIBURTON: Except.

Q. What does a cubic foot of that stone actually weigh?

Mr. HALLIBURTON: Object for the reason he doesn't profess to have weighed the stone. It is simply an estimate, and object further that an estimate of weight would be in violation of law in regard to shipping.
The COURT: I will hear it.
Mr. HALLIBURTON: Except.
A. Government gives 185 pound——
Q. Have you weighed it so as to know?
A. Yes, sir, it weighs 185 pounds; I have weighed it.
The COURT: A cubic foot?
A. Yes, sir, one cubic foot.
Q. In shipping in the slab do you estimate that weight higher in order to make allowance for the cutting down?
A. In shipping stone in the slab we have to sell the man a square slab. If a corner sticks out, we square the slab, consequently there is an over-run and we figure about 200 pounds to the cubic foot.
Q. You estimate the slab over the actual weight?
21 A. Yes, sir. The Frisco didn't have any scales and we have to estimate our stone accordingly and they weigh them at Monett.

Mr. HALLIBURTON: We move to strike out all that evidence about weight as being wholly incompetent.
The COURT: I think it is competent to show what they estimated.
Mr. HACKNEY: It is preliminary to showing just what *what* they did.

Mr. HALLIBURTON: Except.
Q. You say you had a bid for a given quantity from Mr. Hoffman?
A. Yes, sir.

Q. And you made him a delivered price on the basis of this rate given you in this letter by Mr. Marens?

A. Yes, sir.

Mr. HACKNEY: I offer this letter now.

Mr. HALLIBURTON: Object to the letter for the reason the agent can't fix any rate or weight less than that fixed by the filed tariffs.

Mr. HACKNEY: The letter bears on other features.

Mr. HALLIBURTON: I object to that part about the weights.

The COURT: It quotes the same rate as your tariff. I will admit it.

Mr. HALLIBURTON: Except.

Said letter, Exhibit 1, being in words and figures as follows, to-wit:

*Letter Head of St. Louis Southwestern Railway Co.*

Commercial Office,

J. L. Marens, Commercial Agent.

"KANSAS CITY, Mo., *Nov.* 23, 1908.

In your reply, please refer to our file No. 755.

Spring River Stone Co., Carthage, Mo.

GENTLEMEN: Referring to your postal of 21st inst., asking what rate you can get on Stone to Ft. Worth, Tex., via the Frisco
22 and Cotton Belt and also asking at what junction point we connect with the Frisco.

Beg to advice the present rate on Stone, building (not granite or marble), flagging and paving, rough quarried, sawed or dressed, minimum 50,000 pounds, Carthage to Ft. Worth, is 27½c. per hundred pounds as per Item 792, Supplement 6 to Texas Tariff No. 42-B.

Shipments for Fort Worth may be routed via Frisco c/o our line at Jonesboro, and I sincerely trust you can favor us with the shipments you have to go, and wish to ask that when making out your bills of lading you kindly specify thereon c/o Cotton Belt at Jonesboro.

If you will kindly advise forwarding of the shipments on our postal cards, we will take pleasure in tracing and advising arrival and delivery.

Thanking you for past favors, I remain,

Yours truly,

J. L. MARENS,
*Commercial Agent.*"

Q. Now Mr. Johns, did you make Mr. Hoffman a bid on the work?

A. After receiving Mr. Marens' letter we made a price to Mr. Hoffman.

Q. Was that a delivered price?

A. Yes, sir.

Q. Did Mr. Hoffman accept your bid?

A. Yes, sir.

Q. After the acceptance of this bid tell the jury——

Mr. HALLIBURTON: Wait. If he has an acceptance, there ought to be some showing. He don't say he saw Mr. Hoffman after that letter was written.

A. Mr. Hoffman paid the freight at the other end.

Mr. HALLIBURTON: They shipped the stuff at 27½c. a hundred.

Q. After hearing from Mr. Hoffman after getting the acceptance of the bid and this letter from the Cotton Belt route what
23 did you do towards apprizing the Frisco freight office here of the contemplated shipment of these five cars?

A. I stopped there at the freight office and told the man in charge.

Q. What did you tell him?

A. I explained we had to have five 50,000 pound cars. Mr. Hoffman couldn't handle the large cars.

Mr. HALLIBURTON: Who was this party in charge of the Frisco freight office?

A. Well, I couldn't say, they changed hands.

Q. You don't know who you talked to?

A. I don't know as I could state exactly whether Mr. Monday or Mr. Whitlock, but they always had a man in charge of the freight office.

Mr. HALLIBURTON: We object to the conversation with the unidentified party in charge of the Frisco Freight office. They must identify who the conversation was with and not mix parties that can't bind the plaintiff by conversations with agents in charge of the Frisco Freight Office.

The COURT: Overruled.

Mr. HALLIBURTON: Except.

Q. You say it was the man in charge of the freight business at the time?

A. Yes.

Q. You knew him to be in charge then?

A. He talked about the shipment.

Q. But you can't remember which one of the particular indivuals happened to be on duty at that time?

A. It was four years ago and I couldn't state which one.

Q. Mr. Whitlock was there part of the time?

A. Yes, sir.

Q. And Mr. Munday was the agent generally and sometimes he would be at the freight office and sometimes at the passenger office?

A. Yes, sir.

Q. The freight office in Carthage is how far from the pas-
24 senger office?

A. About one hundred yards

Q. They are separate buildings?

A. Yes, sir. We never went to the passenger office with any of our business.

Q. They have a regular force of clerks there and records and

everything pertaining to freight kept over at the freight depot and the passenger business over at the passenger station?

A. Yes, sir.

Q. What, if anything, did you state as to the particular routing of these cars to this agent in charge at the time?

A. I told him we wanted five 50,000 capacity cars, that were to be routed by Jonesboro, Arkansas, and from there on the Cotton Belt Route to Ft. Worth. Mr. Hoffman had the Cotton Belt tracks into his yards and that is the reason he requested the shipment routed that way.

Q. Did you tell the agent of the Frisco Company about when you would be ready to commence the shipment of this stone?

A. We told him we would call him up from the office as soon as the first car was ready.

Q. Do you remember the calling for the cars after that time, Mr. Johns?

A. I instructed Mr. Givens to call up whenever the cars were ready for shipment and explain the shipment as going by Jonesboro as I had already talked to him so he would understand it.

Q. Do you remember of the circumstances of any of the cars being called for while you were in the office, know of the call being made for a 50,000 car?

A. I wouldn't say that I remember Mr. Givens calling up, but he told me that he had.

Q. You couldn't state what he said on that point. Now then, the date of the shipment——

Mr. HALLIBURTON: We will agree about that.

It is agreed that the shipments were on December 1, 4, 15, 25 19 and 29.

Q. I see your first claim was for overcharge $287.78, at that time it appears that you gave simply an estimated weight of the cars loaded, can you—what did you do with the expense bills, did you turn them over to the Cotton Belt Company when you made your claim for overcharge?

A. Yes, sir.

(Letter of February 4th, 1909, admitted in evidence.)

Said letter, Exhibit H, being in words and figures as follows:

"CARTHAGE, Mo., *Feb.* 4, 1909.

Mr. J. L. Marens, Commercial Agent, Cotton Belt Route, Kansas City, Mo.

DEAR SIR: Relative to overcharge on shipments made to Mr. J. B. Hoffman at Ft. Worth, Tex., we are enclosing for your attention expense bills on same together with copies of invoices on the cars included in this shipment. The invoices show our estimated weight on cars, which is as follows:

| | |
|---|---|
| Car No. 94134 C. S. N. O. & P., Est. weight | 59310 |
| Car No. 9193 C. of G., Est. weight | 51450 |
| Car No. 25096 L. & N. Est. weight | 50610 |
| Car No. 1110 M. & N. A. Est. weight | 51555 |
| Car No. 93997 S. F. Est. weight | 51330 |
| Total Weight | 264255 |

| | |
|---|---|
| Freight as per expense bills, 368900 lbs. at 27½ | $1,014.48 |
| Freight as per our weight 264255 lbs. at 27½ | 726.70 |
| Freight as per our weight 264255 lbs. at 27½ | 726.70 |

We therefore respectfully desire to file our claim for overcharge in the amount of $287.78 and would ask that you push this matter as fast as possible so that we may secure refund due us without delay.

Yours very truly,

SPRING RIVER STONE CO.
H. C. JOHNS, *Mgr.*"

26 Q. I see in that letter you place the estimated weights as follows:

First car 59310
2nd car 51450
3rd car 50610
4th car 51555
5th car 51330, making a total weight, estimated of 264255 pounds for the five shipments that was according to your estimated weights?

A. Yes sir.

Q. Did you after that time get some figures from the Frisco railroad as to what purported to be the actual weight at Monet?

Mr. HALLIBURTON: Yes, after that.

Q. Before getting this report as to the actual weight, you made this claim of February 4th for overcharge based on the estimated weight, did you Mr. Johns?

Mr. HALLIBURTON: Here is what he sent us.

Q. Now you made an amendment to your claim and reduced it to $263.73 on the 6th day of February after getting what purported to be the correct weights from Monett, did you?

A. Yes, sir.

Q. Now Mr. Johns, was Mr. Marens, the Commercial Agent ever in Carthage after you made this claim?

A. Yes, sir, he came down here to see about it.

Q. State what occurred between you and Mr. Marens in making your adjustment of this overcharge?

A. We explained the matter to him and he said to get the correct weights from Monett and their company would take the matter right up; he thought they were in error and would pay us back the overcharge.

Q. What was figured about the dunnage on these cars?

A. After our claims went in he took the dunnage up and also took that out of the amount. We didn't have the claim for dunnage in and he took that out, 500 pounds to the car.

Q. That would make 500 pounds for the dunnage?

27 A. Yes, sir, for the stakes used on the car to hold the slabs in place.

Q. That was 500 pounds to each car?

A. Yes, sir.

Q. Did you and Mr. Marens agree on an amount here, as to the correctness of this overcharge before he left Carage?

A. Yes, sir.

Q. Was that the $270.60 that was paid you by this check or draft Mr. Halliburton exhibited to you awhile ago?

A. Yes, sir, that was the amount.

Q. The amount was agreed on while he was here. Did you explain to Mr. Marens all the facts about the shipment and the ordering of these cars?

A. We talked the whole matter over.

Q. And the capacity of the cars ordered?

A. We explained it all.

Q. The purpose of that settlement, Mr. Johns, was to settle——

Mr. HALLIBURTON: Object to the purposes.

Q. I will ask you whether or not in making that claim for overcharge you were endeavoring to violate the law in any respect or whether it was an honest claim you were making against plaintiff as overcharge?

Mr. HALLIBURTON: Object because it is simply a question of law and not of fact or opinion what they were trying to do. I concede both of these parties were acting in good faith and without any real intention of violating the law. There is no claim of anything else in the petition. It is alleged it was by an oversight of the law.

The COURT: With that admission, the objection will be sustained.

Q. You say Mr. Marens was here before you got the money and agreed on the amount and ordered the voucher for $270.60?

A. Yes, sir.

28 Redirect examination.

(Mr. HALLIBURTON:)

Q. On February 6th, 1908, you sent to Mr. Marens a statement of the actual weights of the stone on the car didn't you?

The COURT: Monett weight.

Mr. HALLIBURTON: Yes, sir.

Q. And that was the weight upon which you settled?

A. Yes, sir.

Q. And this is the paper you sent him?

A. I think that is it.

Mr. HALLIBURTON: We offer this letter of February 6th, 1908, from the Spring River Stone Company to J. L. Marens; attached

thereto a statement of the agent of the net weight of the stone. The total of the net weights shipped on the different cars is 273000, according to this statement.

Mr. HACKNEY: We don't agree that was the correct weight.

Said letter and statement, Exhibits A and B, being in words and figures as follows, to-wit:

EXHIBIT A.

"CARTHAGE, Mo., *Feb.* 6, 09.

Mr. J. L. Marens, Kansas City, Mo.

DEAR SIR: We have received today from the Frisco weights on cars shipped to Ft. Worth, Tex., and we are enclosing you same. Their weights are a little more than we estimated them and would make our claim amount to $263.73 instead of $287.78.

Trusting you will find the amount correct and that we may soon receive a settlement on same, we remain,

Yours very truly,

SPRING RIVER STONE CO.
H. C. JOHNS, *Mgr.*"

29 EXHIBIT B.

"CARTHAGE, Mo., 2/5, 1909.

Spring River Stone Co., City.

DEAR SIRS: Information requested attached. The following cars from your Quarry to Ft. Worth were weighed at Monett, Mo., Gross, Tare and Net Weights as follows:

| | | | | |
|---|---|---|---|---|
| 94134 C. S. N. O. & P. | 12/1 | 9.3.4 | 3.23 | 61.100 No. Net. |
| 9193 C. of G. | 4 | 7.3.2 | 2.09 | 52300 Net. |
| 25096 L. & N. | 15 | 82.4 | 29.0 | 52600 Net. |
| 1110 M. & N. A. | 19 | 81.0 | 28.7 | 52300 Net. |
| 93997 S. F. | 30 | 85.5 | 30.8 | 54700 Net. |

Yours truly,

A. W. MUNDAY, *Agent.*"

Q. I call your attention to a letter of date January 30th, 1909, you say that is your signature?

A. Yes, sir.

Q. That is your signature?

A. Yes, sir.

Q. Now I will ask you if you didn't send out with that letter these copies of the way-bills, copies of the freight bills?

A. I will have to read the letter.

Q. All right, read it.

A. I don't see anything in here about way-bills.

THAD GIVENS, sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

(Mr. HALLIBURTON:)

Q. Mr. Givens, have you got the original bills of lading of the stone shipped from Spring River Stone Company to Hoffman at Fort Worth?

30 A. No.

Q. Now Mr. Givens, is this letter signed by you or Mr. Johns, letter of January 30th, 1909?

A. By Mr. Johns.

Q. Now going over here to a letter of February 4th, 1909, did you write and sign that letter for him in his name?

A. Yes, sir.

Q. You were authorized to take care of this correspondence and attend to this business for him and do the necessary signing?

A. Yes, sir.

Q. Was this letter of February 4th, 1909, addressed to J. L. Marens, Commercial Agent of the Cotton Belt at Kansas City, Missouri, did you enclose these statements showing the size and capacity of the cars and amount of stone in each car and also these copies of the freight bills and copies of the way-bills?

A. I think so.

Q. You enclosed them as copies of the original bills to him?

A. I did.

Q. Is this letter of February 5th, 1909, addressed to Marens at Kansas City, did you sign that or Mr. Johns?

A. Mr. Johns.

Q. Now, Thad, did you order the cars for these shipments?

A. Yes, sir.

Q. Over the telephone?

A. Yes, sir.

Q. You don't know who you was talking to?

A. No, there was two or three in the freight office all the time and it might have been one and might have been another.

Q. Now I will present you some tickets marked dates of putting stone in cars, are those copies of your dray or loading tickets?

A. That is a copy of the bill of lading.

31 Cross-examination.

(Mr. HACKNEY:)

Q. You don't mean a copy of the Bill of Lading, but that is simple direction of shipment.

A. That is simply a form we used at that time.

Q. Simply a memorandum you would hand over to the railroad company at the time of the shipment?

A. Yes, sir.

Q. You say you ordered from the Frisco railroad company at Carthage each one of these cars as you wanted to load it?

A. Yes, sir.

Q. You called for a 50,000 capacity car did you not in each case?

A. Why, yes. We wanted these to go all a certain size; it was always customary to call up the depot and give them the capacity car we wanted.

Q. Did you have to tell them where you wanted the shipment to go in this case and how?

A. We generaly told them to go by Frisco and Cotton Belt.

Q. And point of transfer was Jonesboro, Arkansas?

A. Yes, sir.

Q. What is the telephone number of the Frisco Freight Office?

A. 24.

Q. On each phone?

A. Yes, sir.

Q. 26 is the passenger depot?

A. Yes, sir.

Q. When you wanted a car you would call up the Freight office?

A. Yes, sir.

Q. You say you told the person in charge there you wanted a car to load for shipment to Ft. Worth, Texas, via Jonesboro
32 and then Cotton Belt and ordered 50,000 capacity car?

A. I always told them we wanted a 50,000 car to load to Fort Worth, Texas.

Q. You had a shipment which would just be practically five 50,000 cars?

A. Yes, sir.

Q. And you explained what kind of a car you wanted each time?

A. Yes.

Q. Did you consent to them putting you an 80,000 car in there at any time or how did it come they put in an 80,000 car?

A. Often times they didn't have a car of the capacity we wanted——

Mr. HALLIBURTON: Object to that.

The COURT: If he knows.

Mr. HALLIBURTON: Except.

Q. Did you at any time order any car of greater capacity than 50,000 pounds in ordering these five cars?

A. No, sir.

Q. And you explained what you wanted and why you ordered that size car to the railroad company?

A. Yes, sir.

Q. Now Mr. Halliburton asked you about some papers here being correct copies, you don't know whether these are correct copies of the bill of lading, simply memoranda given you by the Frisco railroad company.

A. (No answer.)

Q. I mean some papers you say you attached with your claim, you never compared those with the originals to see whether they were correct copies of the original bills of lading or not?

A. No, sir.

Q. They were just handed to you as copies and you presumed

they were correct copies, is the reason you sent them in to Marens?

33 A. Yes, sir.

Q. Do you recollect of Marens being down here after this claim went in?

A. Yes, sir.

Q. After the original claim for $287.00 was made, and that was after the amended claim went in, after you reduced your claim to conform to the report from Monett as to what the actual weight of these cars was?

A. Mr. Marens came down and we wasn't able to get the exact weight because they was in Monett. We furnished Marens estimated weight and afterwards sent him correct weight.

Q. What was the agreement about the dunnage, what is the dunnage?

A. On every car of stone there is 500 pounds allowed for stakes and that is what is known as dunnage.

Q. So there would be a deduction of 2,500 pounds for these five cars for dunnage?

A. Yes, sir.

Q. That would be from 273,000 pounds reported from Monett would it not?

A. Yes, sir.

Q. How long was Marens here at Carthage at that time when you agreed on the amount of your claim?

A. I think he was here a day.

Q. Did you explain to him at that time the method of ordering these cars and what you had done in trying to get the 50,000 capacity cars?

A. He understood that, I think.

Redirect examination.

(Mr. HALLIBURTON:)

Q. Do you say you explained to the agent every time you called for a car that you wanted a 50,000 car and why you wanted it?

A. We explained——

34 Q. Answer my question. Read the question. (Question read.)

A. I don't know as we went through all the history of the transaction every time but I remember we told them we wanted 50,000 capacity car to load to Fort Worth.

Q. Did you do that every time you ordered?

A. Yes, sir.

Q. You are sure you did that every time you ordered?

A. Yes, sir.

Q. Have you got any books showing that order?

A. No, sir.

Q. You haven't any memoranda of it anywhere?

A. No, they were all ordered over the telephone.

Q. These papers I show you are papers you gentlemen furnished

Mr. Marens when you were trying to make this settlement of your claim?

A. Yes, sir.

Q. It was on these papers he settled it?

A. Yes, sir.

Mr. HACKNEY: Also, he made verbal inquiries here at Carthage when here before agreeing to the amount did he not?

A. Yes, sir, he investigated.

Q. He came to Carthage with these papers after you sent them in to determine the amount of refund to be made?

A. I don't remember whether he came back to Carthage or not.

Q. He was here after you made your original claim?

A. Yes, sir.

Q. And he was in Carthage a whole day on that business alone?

A. Yes, sir.

A. W. MUNDAY, sworn as a witness on behalf of plaintiff, testified as follows:

35 Direct examination.

(Mr. HALLIBURTON:)

Q. Your name is A. W. Munday?

A. Yes, sir.

Q. Live in Carthage?

A. Yes, sir.

Q. What business were you in in 1908?

A. Frisco agent here.

Q. At Carthage?

A. Yes, sir.

Q. In general charge of the business of the Frisco here?

A. Yes, sir.

Q. I will ask you to look at those papers and tell the jury what they are?

A. That is what we call duplicate bill of lading issued by quarry people at the time, duplicate of the originals on our files.

Q. Duplicate bill of lading you issued for that stone?

A. Yes, sir.

Q. Or rather a duplicate of the order they gave for the——

A. For our filing.

The COURT: Is that a carbon copy?

A. I couldn't say as to that, whether it is a carbon of the original or not. I remember at the time they had a bill of lading of their own something similar to that

Q. That shows it is a carbon copy?

A. Yes.

Q. Mr. Munday, did you furnish the Spring River Stone Company—what do you call this paper here?

A. Original bill of lading.

Q. Did you furnish copies of that—of the original bill of lading to the Spring River Stone Company after they got into this controversy about the Freight rates?

A. I couldn't say.
Q. Is that your signature?
A. No, sir.
36 Q. That is written by somebody else in the office?
A. Yes, sir.
Q. This, you would say, come from your office?
A. Yes, sir, copy of the original.
Q. Is that your signature on this?
A. No, sir.
Q. What do — call this long paper here?
A. Way-bill.
Q. And this with red ink on yellowish, freight bills?
A. Yes, sir.
Q. You didn't receive the order for these cars?
A. No, sir.
Q. And you didn't make out the bill of lading or expense bill or freight bills?
A. No, sir.
Q. Those were made out by clerks in the office?
A. Yes, sir.
Q. You keep an order book down there at the office where cars are ordered do you not?
A. Yes, sir.
Q. Personally you don't know anything about the order book in which these cars were ordered?
A. No, sir.

Cross-examination.

(Mr. HACKNEY:)

Q. There was some one representing the Frisco railroad company at the freight office during business hours was there not, Mr. Munday?
A. Yes, sir.
Q. Authorized to act with regard to supplying cars and receiving and shipping freight?
A. Yes, sir.
Q. And make out necessary way-bills?
A. Yes, sir.
37 Q. You are simply the agent for Carthage and you would -pend a considerable portion of your time at the passenger station?
A. More or less of the time there.
Q. And the two passenger and freight depots are about how far apart, something like fifty or one hundred yards?
A. Yes, sir.
Q. They are entirely separate and distinct buildings?
A. Yes, sir.
Q. On different tracks of the road?
A. Yes, sir.
Q. And Mr. Whitlock was in the freight office about that time——

A. Yes, sir, he was.

Q. He had full authority to do the business of receiving and delivering freight and furnishing cars when ordered did he not?

A. Yes, sir, he was there for that purpose.

Q. You never did compare these papers here that purport to be copies of the original bills of lading with the bills of lading?

A. No, sir.

Q. While they have your name on them, they were compared by some person besides yourself?

A. Yes, sir.

Q. You didn't examine the originals to see whether they are correct copies or not?

A. No, sir.

Q. How long have you been connected with the Frisco as agent?

A. Twenty-one years.

Q. How long have you been stationed at Carthage?

A. Over ten years?

Q. How far is it over to the Spring River Stone Company's office from the freight depot?

A. Three quarters or a mile.

38 Q. There is telephone connection between the two offices?

A. Yes, sir.

Q. Do you know as a matter of fact, that along in December, 1908, and last of November, the Frisco railroad company had very few 50,000 capacity freight cars; it was very difficult to get hold of those cars?

A. Yes, sir.

Q. And don't you know you did furnish these greater capacity cars to the stone company in these cases as a matter of convenience to the railroad company?

A. Yes, sir.

Q. Where greater capacity car was furnished and smaller capacity ordered it was done for the convenience of the railroad company?

A. Why, yes, the greater capacity was furnished to protect the company in a matter of business.

Q. Was that a matter of usual occurrence?

A. Yes, sir.

Q. I notice in these five shipments, only one is a Frisco car, the others are other lines, was there a car shortage at that time?

A. At that time we used any kind of a car.

Q. These cars were flat cars?

A. Yes, sir.

Q. And the Frisco had but very few of the flat cars of 50,000 capacity?

A. They didn't supply us with them.

Q. You nearly always had to do with a greater capacity car?

A. More or less.

Redirect examination.

(Mr. HALLIBURTON:)

Q. Do you know whose handwriting those copies are made in?

39 A. Whitlock's?
Q. He was in charge of the freight office?
A. No, sir, he was yard clerk and bill clerk.
Q. He was the man that made out the bills of lading?
A. Yes, sir, and sign them and take orders for cars.
Q. He is now in California?
A. Yes, sir.
Q. These copies are all in his handwriting?
A. No, sir, that one was made at Fort Worth.
Q. This bill of lading is in his handwriting?
A. Yes, sir.

Mr. HACKNEY: You never compared the way-bills to see if they were correct?

A. No, sir.
Q. Couldn't say they are absolutely literally correct?
A. No, sir

W. E. LOEHR, sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

(Mr. HALLIBURTON:)

Q. Mr. Loehr, where do you live?
A. Carthage.
Q. What is your business?
A Agent for the Frisco Railroad Company.
Q. How long have you been agent of the Frisco?
A. At Carthage?
Q. Altogether?
A. Twenty-five years?
Q. How long at Carthage?
A. Since last August.
Q. I will ask you whether or not you have made an examination or had one made in the freight office down there to find the original order book that was used in December, 1908, where cars were ordered?
A. I have, and personally assisted in a diligent search.
40 Q. Have you been able to find it?
A. No, sir, have not.
Q. Mr. Loehr, what is the regular custom and habit of the railroad company where a car of a certain capacity is ordered and you have not a car of that capacity and have to furnish a car of larger capacity, what do you do on the way-bills?

Mr. HACKNEY: Object to the custom. It is a question of what was done, and the proof shows these 50,000 capacity cars were ordered by us and the proof shows they were short that kind of cars. The testimony of Mr. Givens shows that cars of greater capacity were furnished him when smaller was ordered. That is as far as the shipper can go. The shipper has nothing further to do

with that. Whether they make a notation then here or there is out of the control of the shipper.

The COURT: Sustained.

Mr. HALLIBURTON: Except.

Q. Now, Mr. Loehr, just examine that and state what that is.

A. That is a duplicate bill of lading.

Mr. HACKNEY: Object to the question because the document speaks for itself as to what it is, and it is not a matter of expert opinion and also the statement of the witness——

The COURT: It shows for itself.

Mr. HACKNEY: We ask the statement of the witness be stricken out, that it is a duplicate bill of lading.

The COURT: Strike it out.

Mr. HALLIBURTON: Except.

Q. Where did you get those?

A. Searched the files and took them from the files at the station freight office.

Q. Those were on file there in the office?

A. Yes, sir.

Q. Can you say whether those are carbon copies or not?

A. They are.

41 Q. Now in making out the way-bill—bill of lading—in making that out, the original was furnished to who?

A. The shipper, the Spring River Stone Company.

Mr. HACKNEY: He doesn't have any knowledge of that particular case.

Q. It is delivered to the shipper?

A. Yes, sir.

Cross-examination.

(Mr. HACKNEY:)

Q. Now, Mr Loehr, you know the railroad company has its own form of bill of lading that it issues do you not, whenever—The bill of lading is on a separate document, the memorandum you find here is a memorandum you found in the office down there and that is what is commonly called a shipping ticket, and you have them on file in the Frisco office, when you came in charge long after this transaction and you know nothing personally of what occurred in this office in 1908?

A. No, sir.

Q. What documents were issued or filed there?

A. No, sir.

Q. You do know, do you not, the Frisco in 1908 had very few flat cars of 50,000 pound capacity?

A. I do, yes, sir.

Q. It was very difficult for them to get hold of that kind of car?

A. They were very scarce.

Q. And in their business they had to furnish greater capacity cars frequently where smaller capacity was ordered?

A. Yes, sir.
Q. As a matter of their own convenience?
A. Yes, sir.

THAD GIVENS, recalled, as a witness on behalf of plaintiff, testified as follows:

42 Direct examination.

(Mr. HALLIBURTON:)

Q. I call your attention to five slips here of date of 11-30-08, 12-4-08; 12-15-08; 12-19-08; 12-29-08, and ask you if those are duplicates of a bill of lading made out by you and furnished the Frisco?

Mr. HACKNEY: Object to the term "bill of lading."

Q. Shipping ticket, or whatever you call it?
A. Yes, sir.
Q. You furnished that to the railroad company?
A. Yes, sir.
Q. And they delivered you a bill of lading afterwards?
A. Well, they didn't deliver it to us.
Q. You didn't get a bill of lading?
A. Oh, no, often times we didn't.
Q. Now I will ask you if the bill of lading wasn't attached to this on the other end?
A. They served the same as bill of lading.
Q. This is intended to take off the written part of the bill of lading?
A. Yes, sir.
Q. The writing on this is the same as on the bill of lading?

Mr. HACKNEY: Object as a conclusion.

Q. This is on the end of the bill of lading?
A. No. This is a special form we used. We made three copies of that one size, just the same as that. One copy we gave to the railroad company and one copy went to the consignee and one we kept.
Q. This is the copy you gave to the railroad company?
A. Yes.
Q. Now you say they didn't give you—turn over to you the bill of lading?
A. No, sir.
Q. Didn't you get the bill of lading and forward it to the consignee?
A. No, we forwarded a copy of that.
43 Q. Now the agent signed a copy of this for you and let you forward it to the consignee?
A. Yes, sir.
Q. And that was the bill of lading he gave to you?

Mr. HACKNEY: Object as leading and suggestive. It couldn't be a bill of lading.

Mr. HALLIBURTON: I don't know what would keep it from being a bill of lading.

Q. They receipted one of these or two of them and handed them to you and one you sent to the Consignee at Fort Worth?
A. They receipted one and we sent that forward, yes.
Q. And you didn't receive at your office any other bill of lading?
A. No.
Q. You don't know of the consignee receiving any other?
A. No.

Cross-examination.

(Mr. HACKNEY:)

Q. Now, Mr. Givens, I understand you are speaking now of a form you used as a shipping ticket?
A. Yes.
Q. That memorandum with directions to the Frisco to ship property, that is memorandum you got them to give you a duplicate of and you sent that on to the consignee at Fort Worth, Texas, to indicate to them *that* who had loaded the car?
A. Yes, sir.
Q. You didn't pay any attention about the formal bill of lading which they would issue after that time, don't know where these bills of lading were?
A. No, sir.
Q. Afterwards when you were called on for bills of lading, some person down in the office gave you what he claimed were copies of bills of lading?
44 A. Yes, sir.
Q. And you didn't compare them with the originals to see whether they were copies or not?
A. No, sir.
Q. To see whether there was any notation that hadn't been put on that copy?
A. No, sir.
Mr. HALLIBURTON: The railroad didn't deliver you anything but one of these signed?
A. That is all.
Q. You don't know they sent the consignee down at Fort Worth Texas, any bill of lading, except from this you sent them?
A. No, sir.

A. W. MUNDAY, recalled, as a witness on behalf of plaintiff, testified as follows:

Direct examination.

(Mr. HALLIBURTON:)

Q. While you was in charge of the office down there, for instance, take these papers I show you here, C, D, E, F and G, now just state how—that was a copy you say written in your office?

A. We keep a copy of the bill of lading in our office.

Q. What do you give the consignor?

Mr. HACKNEY: Object because Mr. Munday wasn't present at the time they gave these tickets and he didn't have anything to do with the ordering or furnishing of the cars or making out the contracts or bills of lading or way-bills, that that was done by other persons and he was not present when it was done, doesn't know what was done in this particular case, hence we say it would be a mere matter of opinion.

The COURT: Sustained.

Mr. HALLIBURTON: Except.

Q. State whether the railroad company in your experience ever sends a bill of lading to the consignee?

45 Mr. HACKNEY: Object as a matter of opinion and wouldn't have any tendency to throw any light on this case. He doesn't claim to have been present when the transaction occurred but it was done by Mr. Whitlock and other employees present.

The COURT: Sustained.

Mr. HALLIBURTON: Except.

Mr. HALLIBURTON: We offer in evidence Exhibits C, D, E, F and G, being these slips that Mr. Givens identified as duplicates of which he was given one signed by the railroad company.

Said Exhibits C, D, E, F and G, being in words and figures as follows, to-wit:

EXHIBIT C.

St. Louis and San Francisco R. R. Co.

CARTHAGE, MO., 11-30, 1908

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shipper, addressed to—

J. B. Hoffman, Ft. Worth, Tex.,
Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of packages. | Weight. |
|---|---|
| Stone. | |
| Car No. 94134, C. S. N. O. & P..... | 50,000 |
| Less 500 lbs. for stakes. | |

SPRING RIVER STONE CO., *Shipper.*

46

EXHIBIT D.

St. Louis and San Francisco R. R. Co.

CARTHAGE, Mo., 12-4, 1908.

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shipper, addressed to—

J. B. Hoffman, Ft. Worth, Tex.,
Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of packages. | Weight. |
|---|---|
| Stone. | |
| Car No. 9193, C. of G..... | 50,000 |
| Less 500 lbs. for stakes. | |

Not Negotiable.

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of lading. All conditions herein to the contrary are cancelled.

Shipper's Signature, Spring River Stone Co.
Agent's Signature, A. W. Munday.

SPRING RIVER STONE CO., *Shipper.*

47

EXHIBIT E.

St. Louis and San Francisco R. R. Co.

CARTHAGE, Mo., 12-15, 1908.

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shipper, addressed to—

J. B. Hoffman, Ft. Worth, Tex.,
Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of packages. | Weight. |
|---|---|
| Stone. | |
| Car No. 25096, L. & N..... | 50,000 |
| Less 500 lbs. for stakes. | |

Not Negotiable.

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of lading. All conditions herein to the contrary are cancelled.

Shipper's Signature, Spring River Stone Co.
Agent's Signature, A. W. Munday.

SPRING RIVER STONE CO., *Shipper.*

48 EXHIBIT F.

St. Louis and San Francisco R. R. Co.

CARTHAGE, Mo., 12-18, 1908.

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shipper, addressed to—

J. B. Hoffman, Ft. Worth, Tex.,
Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of packages. | Weight. |
|---|---|
| Stone. | |
| Car No. 1110, M. & N. A..... | 51,000 |

Less 500 lbs. for stakes.

Not Negotiable.

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of lading. All conditions herein to the contrary are cancelled.

Shipper's Signature, Spring River Stone Co.

Agent's Signature, A. W. Munday.

SPRING RIVER STONE CO., *Shipper.*

49 EXHIBIT G.

St. Louis and San Francisco R. R. Co.

CARTHAGE, Mo., 12-29, 1908.

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shipper, addressed to—

J. B. Hoffman, Ft. Worth, Tex.,

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of packages. | Weight. |
|---|---|
| Stone. | |
| Car No. 93997, S. F..... | 50,000 |

Not Negotiable.

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of lading. All conditions herein to the contrary are cancelled.

Shipper's Signature, Spring River Stone Co.

Agent's Signature, A. W. Munday.

SPRING RIVER STONE CO., *Shipper.*

50 Mr. HALLIBURTON: We offer in evidence the deposition of John P. Dolan.

Said deposition of John P. Dolan, being in words and figures as follows, to-wit:

Caption.

Depositions of witnesses produced, sworn and examined on the 17th day of May, in the year of our Lord 1911, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Charles D. James, in Central Block, east side of Spring Street, in the City of Eureka Springs, in the County of Carroll and the State of Arkansas, before me, William Jenkins, a Notary Public within and for the County of Carroll and State of Arkansas, in a certain cause now pending in the Circuit Court of Jasper County, at Carthage, Missouri, between the St. Louis Southwestern Railway Company of Texas, Plaintiff, and Spring River Stone Company, Defendant, on the part of the Plaintiff.

—— DOLAN, of lawful age, being produced, sworn and examined on the part of the Plaintiff, deposeth and saith:

Q. State your name, age, residence and occupation?

A. John P. Dolan, Master Mechanic of the Missouri & North Arkansas Railroad Company; age forty-five; residence Ridgeway Avenue, Eureka Springs, Arkansas.

Q. You may state how long you have been in the employ of the Missouri & North Arkansas Railroad Company?

A. Since April, 1903.

Q. Please state what your duties as Master Mechanic consist of?

A. Responsible for the maintenance of all locomotives and rolling stock

Q. You may state what you mean by the rolling stock of the company?

A. All freight and passenger cars.

Q. I will ask you to state whether or not the Missouri & North Arkansas Railroad Company have a car which is known as M. & N. A. car number 1110.

51 A. Yes, sir.

Q. I will ask you to state if you know what the marked capacity of that car is.

A. Yes, sir, I do. The capacity of the car was 80,000 but the word "capacity" was omitted and the car was stenciled 88,000 load limit.

Q. I will ask you to state what you mean by the load limit of 88,000 pounds.

A. I mean that the car being marked 88,000 pounds load limit was not to be loaded more than that number of pounds.

Q. In what way is this car number 1110 marked or designated?

A. The name "Missouri & North Arkansas" is spelled out in full on the side sills and the end sills have "M. & N. A."

Q. I will ask you to state what the "M. & N. A." stands for? A. Missouri & North Arkansas.

No Cross Examination.

JOHN P. DOLAN.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

[SEAL.] WM. JENKINS,
*Notary Public.*

*Certificate.*

I, William Jenkins, a Notary Public within and for the County of Carroll, in the State of Arkansas, do certify, that in pursuance of the annexed notice to take depositions, came before me at the law office of Charles D. James, in Central Block, east side of Spring Street in the City of Eureka Springs, in the County and State last aforesaid, John P. Dolan, who was by me duly sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced to writing and sub-
52 scribed by him, in my presence, on the day, between the hours, and at the place in that behalf first aforesaid; and his said deposition is now herewith returned. And I further certify that John P. Dolan is a resident of the City of Eureka Springs, County of Carroll, in the State of Arkansas.

Given at Eureka Springs, in the County of Carroll and State of Arkansas the 17th day of May, 1911.

[SEAL.] WM. JENKINS,
*Notary Public, Carroll County, Arkansas.*

My commission expires Sept. 28th, 1912.

STATE OF ARKANSAS,
*County of Carroll, ss:*

It is hereby certified that William Jenkins, on the 17th day of May in the year of our Lord 1911, was and now is a Notary Public within and for the County of Carroll, State of Arkansas, duly commissioned and acting as such, and that full faith and credit are due to his acts as such.

In Testimony Whereof, I Tobe Smith, Clerk of the Circuit Court and Ex-Officio Recorder of Deeds of the County of Carroll and State of Arkansas, have hereunto subscribed my name and affixed the seal of office this 17th day of May, 1911.

[SEAL.] TOBE SMITH,
*Circuit Clerk and ex-Officio Recorder of Deeds.*
By J. H. DAVIDSON, *Deputy.*

Mr. HALLIBURTON: We offer the deposition of Geo. A. Hancock.

Said deposition of Geo. A. Hancock, being in words and figures as follows, to-wit:

*Deposition of Witness.*

Produced, sworn and examined on the 16th day of May, in the year of our Lord, 1911, between the hours of eight o'clock in the
53 forenoon and six o'clock in the afternoon of that day, in the office of Mann, Johnson & Todd, 910 Woodruff Building, in the City of Springfield, in the County of Greene, and State of Missouri, before Carrie L. Hopwood, Notary Public in and for Greene County, Missouri, in a certain cause now pending in the Circuit Court of Jasper County, at Carthage, in the State of Missouri, between St. Louis Southwestern Railway Company of Texas, plaintiff, and Spring River Stone Company, defendant, on the part of the plaintiff.

GEO. A. HANCOCK, of lawful age, being produced, sworn and examined on the part of plaintiff, deposeth and saith:

Q. Mr. Hancock, where did you reside in the year 1908, and where do you reside at present, and what was your business at that time and since then?

A. In the year 1908 I resided at Springfield, where I now reside. I was then, and am now, General Superintendent Motive Power, St. Louis and San Francisco Railroad Company.

Q. Were you acquainted with car St. L. & S. F. 93997 in the month of December, 1908?

A. Yes, sir, from our detailed records?

Q. What do the initials St. L. & S. F. mean?

A. St. Louis and San Francisco.

Q. Did you know the marked capacity of the above mentioned car in December, 1908, and what was that capacity if you knew?

A. I was acquainted with its marked capacity, and it was eighty thousand pounds.

Q. Were you acquainted in December 1908 with C. S. N. O. & P. car 94134?

A. Yes, sir, from our book records.

Q. What do the initials C. S. N. O. & P. stand for?

A. Colorado, Southern, New Orleans & Pacific.

Q. What if you know, was the marked capacity of this car 94134?

A. The marked capacity was eighty thousand pounds. My knowledge of these cars is obtained from general observation and our book records, which give the details, general dimensions, class of
54 car and builder. I find that these are flat cars of steel construction, and of the length of forty-three feet, built by the American Car & Foundry Company, and of the marked capacity as above given.

GEO. A. HANCOCK.

Subscribed and sworn to before me this 16th day of May, A. D. 1911.

[SEAL.] CARRIE L. HOPWOOD,
*Notary Public.*

STATE OF MISSOURI,
*County of Greene, ss:*

I, Carrie L. Hopwood, Notary Public within and for the County of Greene in the state of Missouri, do certify that in pursuance of the within commission and notice, came before me, at the office of Mann, Johnson & Todd, 910 Woodruff Building, in the City of Springfield, in the county and state last aforesaid, Geo. A. Hancock, and was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined, and his examination reduced to writing, and subscribed by him, in my presence on the day, between the hours, and at the place in that behalf first aforesaid, and his deposition is now herewith returned.

And I further certify that the said Geo. A. Hancock is a resident of the County of Greene, in the State of Missouri.

Given at Springfield, in the County of Greene, and State of Missouri, this 16th day of May, A. D. 1911.

My commission expires February 17th, 1914.

[SEAL.] CARRIE L. HOPWOOD,
*Notary Public.*

MR. HALLIBURTON: We offer deposition of C. B. Phelps.

Said deposition of C. B. Phelps, being in words and figures as follows, to-wit:

Depositions of witness produced, sworn and examined, on the 19th day of May, in the year of our Lord One Thousand
55 Nine Hundred and Eleven, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day at Louisville in the County of Jefferson and State of Kentucky, at the office of H. L. Stone, in the L. & N. Building, Ninth & Broadway Sts., in said city, before me, a Notary Public within and for the County of Jefferson, and state aforesaid, in a certain cause now pending in the Circuit Court of Jasper County at Carthage, in the State of Missouri, between the St. Louis Southwestern Railway Company of Texas, Plaintiff, and Spring River Stone Company, Defendant, on the part of the Plaintiff, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith:

My name is C. B. Phelps, and I am Superintendent of Transportation of the Louisville and Nashville Railroad Company.

My residence is at Louisville, Kentucky.

I have been Superintendent of Transportation of the Louisville and Nashville Railroad Company for eleven years.

As Superintendent of Transportation, it is my duty to have records kept concerning the movement of cars and trains, both passenger and freight, the time when these cars and trains move, and the record of delays, if any, and the cause*d* therefor.

As Superintendent of Transportation, it is my duty to see that an accurate record is kept of the dimensions and capacity of cars,—

that is of freight cars. The dimensions and capacity of freight cars is marked on the sides of the cars.

These records are kept at Louisville, Kentucky, by competent clerks under my jurisdiction.

With reference to the letters "L. & N." on our cars, will say that they stand for and mean that they are "Louisville and Nashville" cars, and are the property of the Louisville and Nashville Railroad Company, a railroad incorporated under the Laws of the State of Kentucky and whose General Offices are at Louisville, Ky.

56 We had in our possession in December 1908, an L. & N. car No. 25096 and still have such car. I know this from our records. The marked capacity of this car was in December, 1908, and still is Eighty Thousand Pounds.

The record of the movement of L. & N. Car No. 25096 from November 1st to December 30th, 1908, is as follows:

It was on the Kansas City, Clinton & Springfield Railway on November 1, 1908; it remained there until Nov. 3rd, 1908, when it moved to the St. Louis & San Francisco Railroad; it moved from the St. L. & S. F. R. R. to the Kansas City Belt Railway on November 4th, 1908. We are short the movement date of this car from the Kansas City Belt to the St. Louis & San Francisco Railroad. It was on the St. Louis & San Francisco Railroad from the date it was given to that road until Nov. 20, 1908, but we do not know the date it was given to the St. Louis & San Francisco Railroad. This car was delivered by the St. Louis & San Francisco Railroad to the Atchison, Topeka & Santa Fe Railway on November 20, 1908, and back to the St. Louis & San Francisco Railroad December 8, 1908. It was delivered to the St. Louis Southwestern Railway Company of Texas by the St. Louis & San Francisco Railroad on December 21, 1908. It was delivered by the St. Louis Southwestern Railway of Texas to the St. Louis & San Francisco Railroad on Dec. 30, 1908. The car has not been destroyed, but is still in service.

C. B. PHELPS.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

[SEAL.] H. C. McLELLEN,
*Notary Public.*

I, H. C. McLellen, a Notary Public, within and for the County of Jefferson, in the State of Kentucky, do certify, that in pursuance of the annexed commission and notice, came before me at Louisville, in the County and State last aforesaid, Mr. C. B. Phelps, who was by me duly sworn to testify the whole truth of his knowledge

57 touching the matter in controversy aforesaid; that he was examined, and his examination reduced to writing, and subscribed by him, in my presence, on the 19th day of May in the year of our Lord 1911, between the hours, and at the place in that behalf first aforesaid, and his said deposition is now herewith returned; And I further certify that the said witness is a resident of the County of Jefferson, in the State of Kentucky.

Given at Louisville, in the County of Jefferson and State of Kentucky this 19th day of May, 1911.

[SEAL.] H. C. McLELLEN,
*Notary Public, Jefferson County, Kentucky.*

My commission expires February 26, 1912.

It is hereby certified that H. C. McLellen, on the nineteenth day of May, in the year of our Lord, one Thousand Nine Hundred and Eleven, was, and now is, a Notary Public, within and for the County of Jefferson, in the State of Kentucky, duly commissioned and acting as such, and that full faith and credit are due to his acts as such.

In Testimony Whereof, I, P. S. Ray, County Clerk of Jefferson County, State of Kentucky, have hereunto subscribed my name and affixed the seal of office, this 19th day of May, 1911.

[SEAL.] P. S. RAY,
*County Clerk, Jefferson County, Ky.*

Mr. HALLIBURTON: We offer in evidence deposition of F. F. Gains. Said deposition of F. F. Gains, being in words and figures as follows, to-wit:

Depositions of witnesses produced, sworn and examined on the 23rd day of May, A. D. 1911, in the year of our Lord Nineteen Hundred and Eleven between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day at the office of Lawton & Cunningham, 26 Bryan Street in the City of (East) Savannah, in the County of Chatham and State of Georgia, before me T. F. Walsh, Jr., Notary Public in and for said
58 County of Chatham and State of Georgia, in a certain cause now pending in the Circuit Court of Jasper County at Carthage, Missouri, between St. Louis Southwestern Railway Company of Texas, Plaintiff, and Spring River Stone Company, Defendant on the part of the plaintiff.

F. F. GAINES of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

I am Superintendent of Motive Power of the Central Georgia Railway Company. I know Central of Georgia Railway Company freight car number 9193 and knew the same in December 1908. That the marked capacity of car number 9193 aforesaid was 60,000 pounds and that is the same mark capacity at present and was the marked capacity when it was built. The letters on said car "C. of Ga." indicate the name "Central of Georgia Railway Company" the owner of the car.

F. F. GAINES.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

T. F. WALSH, JR.,
*Notary Public, Chatham County, Georgia.*

I, T. F. Walsh, Jr., Notary Public within and for the County of Chatham in the State of Georgia do certify that in pursuance of the annexed commission and notice, came before me at Savannah in the County and State last aforesaid, F. F. Gaines who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid: that he was examined and his examination reduced to writing and subscribed by him in my presence on the day, between the hours, and at the place in that behalf first aforesaid; and his deposition is now herewith returned. And I further certify that said F. F. Gaines is a resident of the County of Chatham in said State of Georgia.

Given at Savannah, in the County of Chatham and State of Georgia this 23rd day of May, A. D. 1911.

[SEAL.]

T. F. WALSH, JR.,
*Notary Public, Chatham County, Georgia.*

59 It is hereby certified that T. F. Walsh, Jr., on the twenty-third day of May, in the year of our Lord Nineteen Hundred and Eleven was and now is a Notary Public within and for the County of Chatham, State of Georgia duly commissioned and acting as such and that full faith and credit are due to his acts as such.

In Testimony Whereof, I, James K. P. Can, Clerk of the Superior Court of Chatham County, Georgia have hereunto subscribed my name and affixed the seal of office this 23rd day of May, A. D. 1911.

[SEAL.]

JAMES K. P. CAN,
*Clerk Superior Court, Chatham County, Georgia.*

Mr. HALLIBURTON: We offer in evidence letter marked Exhibit H, together with five statements as to the different cars. (See page 25 of this record for Exhibit H.)

Said five statements, being in words and figures as follows, to-wit:

60 CARTHAGE, MO., *Nov.* 30, 1908.

J. B. Huffman, Ft. Worth, Tex.

Bought of Spring River Stone Company, Building and Monumental Stone.

Car No. 94134, C. S. N. O. & P.

| Date | No. Pieces | Length | Width | Thickness | Cu. Ft. | Total |
|---|---|---|---|---|---|---|
| | 5 | 10–0 | 4–0 | –4 | 66–8 | |
| | 1 | 9–0 | " | " | 12–0 | |
| | 1 | 10–0 | " | –7¼ | 24–2 | |
| | 7 | 10–0 | " | –5½ | 128–4 | |
| | 1 | 10–0 | " | 4¾ | 15–10 | |
| | 4 | 10–0 | 4–6 | 5½ | 82–6 | |
| | | | | | 329–6 at 180 lbs. | 59310 lbs. |

61 CARTHAGE, MO., *Dec.* 3, 1908.

J. B. Huffman, Ft. Worth, Tex.

Bought of Spring River Stone Company, Building and Monumental Stone.

Car No. 9193, C. of G.

| Date | No. Pieces | Length | Width | Thickness | Cu. Ft. | Total |
|---|---|---|---|---|---|---|
| | 1 | 10–0 | 4–0 | 1–1 | 43–4 | |
| | 7 | 10–0 | " | –7¼ | 169–2 | |
| | 3 | 10–0 | " | –5½ | 55–0 | |
| | 1 | 10–0 | " | " | 18–4 | |
| | | | | | 285–10 at 180 lbs. | 51450 lbs. |



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CARTHAGE, MO., *Dec.* 15, 1908.

J. B. Huffman, Ft. Worth, Tex.

Bought of Spring River Stone Company. Building and Monumental Stone.

Car No. 25096, L. & N.

| Date | No. Pieces | Length | Width | Thickness | Cu. Ft. | Total |
|---|---|---|---|---|---|---|
| | 2 | 10–0 | 5–0 | –10 | 83–4 | |
| | 1 | 10–0 | 2–1 | " | 17–4 | |
| | 2 | 10–0 | 4–0 | –7¼ | 48–4 | |
| | 1 | 6–0 | 2–6 | 10–0½ | 15–7 | |
| | 1 | 11–0 | 4–6 | –6 | 24–9 | |
| | 1 | 10–0 | 5–0 | –8¾ | 36–5 | |
| | 2 | 10–0 | " | –4¾ | 39–7 | |
| | 1 | 10–0 | " | " | 15–10 | |
| | | | | | 281–2 at 180 lbs. | 50610 lbs. |

63

J. B. Huffman, Ft. Worth, Tex. CARTHAGE, Mo., *Dec.* 19, 1908.

Bought of Spring River Stone Company, Building and Monumental Stone.

Car No. 1110, M. & N. A.

| Date | No. Pieces | Length | Width | Thickness | Cu. Ft. | Total |
|---|---|---|---|---|---|---|
| | 3 | 9–0 | 4–3 | –4¾ | 48–1 | |
| | 2 | 11–0 | 4–0 | " | 34–10 | |
| | 1 | 10–9 | 4–3 | " | 17–10 | |
| | 2 | 9–0 | " | 1–1 | 43–9 | |
| | 1 | 9–0 | " | –8¾ | 29–6 | |
| | 3 | 10–0 | | –7½ | 54–4 | |
| | 1 | 10–0 | | 1–0 | 37–3 | |
| | 1 | 5–3 | | " | 20–7 | |
| | | | | | 286–5 at 180 lbs. | 51555 lbs. |

64

J. B. Huffman, Ft. Worth, Tex. CARTHAGE, Mo., *Dec.* 30, 1908.

Bought of Spring River Stone Company, Building and Monumental Stone.

Car No. 93997, S. F.

| Date | No. Pieces | Length | Width | Thickness | Cu. Ft. | Total |
|---|---|---|---|---|---|---|
| | 4 | 11–0 | 4–6 | –6 | 99–0 | |
| | 1 | 8–6 | 4–0 | –10 | 28–4 | |
| | 1 | 6–0 | " | 1–8 | 40–0 | |
| | 1 | 8–6 | 4–0 | 1–5½ | 49–7 | |
| | 1 | 11–0 | 4–0 | 1–1 | 47–8 | |
| | 1 | 6–0 | " | –4¾ | | |
| | 1 | 7–0 | " | " | 20–7 | |
| | | | | | 285–2 at 180 lbs. | 51330 lbs. |

THIS PAGE BOUND VERTICAL IN BOOK

65 Mr. HALLIBURTON: I offer the freight bills, exhibits N to R, inclusive, being freight bills.

Mr. HACKNEY: To that we object because these documents are not shown by any person having knowledge of the facts to be copies of the originals and because the originals are the best evidence of the contents.

The COURT: Sustained.

Mr. HALLIBURTON: Except.

Said Exhibits N to R, inclusive, being in words and figures as follows, to-wit:

EXHIBIT N.

*Freight Bill.*





Date of Issue Dec. 7, 1908.

Consignee
J. B. Huffman

Freight Bill Number
140

Issuing Station
Ft. Worth, Tex.

Destination and route, if for beyond issuing station.
Do.

To St. Louis Southwestern Ry. Co. of Texas, Dr., for charges on articles transported from

| Billing Station and Route | Way-Bill Number and Date | Car Initial and Number |
|---|---|---|
| Carthage, Mo. | S. P. J1 12-1-08 | C. S. N. O. & P. 94154 |

Shipper and Original Point of Shipment
S. R. S. Co.

| Number of Packages, Articles and Marks | Weight | Rate | Freight Charges | Advances | Total |
|---|---|---|---|---|---|
| Car Stone | 61400<br>500 | | | | |
| O. R.<br>One slab stone broken | 60900 | 27½ | 167.48 | | 167.48 |

Copy.

Received payment for the Company 12-14, 1908.
W. H. Phillips, Agent, per .....

Total

All freight subject to Storage or Trackage according to current Storage and Car Service rules.

Agents must use indelible pencil and carbon paper or typewriter and carbon paper. The use of lead pencil will not be permitted either on freight bill or receipt.

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EXHIBIT O.

*Freight Bill.*

Date of Issue Dec. 14, 1908.

Consignee
J. B. Huffman

Freight Bill Number
326

Issuing Station
Ft. Worth, Tex.

To St. Louis Southwestern Ry. Co. of Texas, Dr., for charges on articles transported from

| Billing Station and Route | Way-Bill Number and Date | Car Initial and Number |
|---|---|---|
| Carthage, Mo., S. F. | S. L. T. J. 12-4 | C. of G. 9193 |

| Shipper | Original Point of Shipment | Original Car | Initial and Number |
|---|---|---|---|
| S. R. S. Co. | | | |

| Number of Packages, Articles and Marks | Weight | Rate | Freight Charges | Advances | Total |
|---|---|---|---|---|---|
| Carthage, Stone 500 lbs. for stakes. | 60,000 | 27½ | 165.00 | | |
| | | Total | | 165.00 | |

Received payment for the Company 12-16, 1908.
W. H. Phillips, Agent, per Lehane.

All freight subject to Storage or Trackage according to current Storage and Car Service rules.
Agents must use indelible pencil and carbon paper. The use of lead pencil will not be permitted either on freight bill or receipt.

SPRING BEAR STOVE COMPANY.

EXHIBIT P.

*Freight Bill.*

Date of Issue Dec. 24, 1908

Consignee
J. B. Huffman

Freight Bill Number
578

Issuing Station
Ft. Worth, Tex.

To St. Louis Southwestern Ry. Co. of Texas, Dr., for charges on articles transported from

| Billing Station and Route | Way-Bill Number and Date | Car Initial and Number |
|---|---|---|
| Carthage | S. L. T. J. 2-12-15 | L. & N. 25096 |

Shipper
S. R. S. Co.

Original Point of Shipment

Original Car

Initial and Number

| Number of Packages, Articles and Marks | Weight | Rate | Freight Charges | Advances | Total |
|---|---|---|---|---|---|
| Carthage Stone | 80,000 | 27½ | 220.00 | | |
| | | | Total | | 220.00 |

Received payment for the Company 12-26, 1908.
W. H. Phillips, Agent, per Lehane.

All freight subject to Storage or Trackage according to current Storage and Car Service rules.

Agents must use indelible pencil and carbon paper. The use of lead pencil will not be permitted either on freight bill or receipt.

EXHIBIT Q.

*Freight Bill.*

Date of Issue Dec. 28, 1908.

Consignee
J. B. Huffman

Freight Bill Number
638

Issuing Station
Ft. Worth, Tex.

To St. Louis Southwestern Ry. Co. of Texas, Dr., for charges on articles transported from

| Billing Station and Route | Way-Bill Number and Date | Car Initial and Number |
|---|---|---|
| Carthage. | S. L. T. J. 3 12-19 | 1110 M. & N. A. |

| Shipper | Original Point of Shipment | Original Car | Initial and Number |
|---|---|---|---|
| S. R. S. Co. | | | |

| Number of Packages, Articles and Marks | Weight | Rate | Freight Charges | Advances | Total |
|---|---|---|---|---|---|
| Stone | 88,000 | 27½ | 242.00 | | |
| | | Total | | 242.00 | |

Received payment for the Company 12-29, 1908.
W. H. Phillips, Agent, per Lehane.

All freight subject to Storage or Trackage according to current Storage and Car Service rules.
Agents must use indelible pencil and carbon paper. The use of lead pencil will not be permitted either on freight bill or receipt.

STERLING RIVER STONE COMPANY.

EXHIBIT R.

*Freight Bill.*

Date of Issue Jan. 7, 1909.

Consignee
J. B. Huffman

Freight Bill Number
115

Issuing Station
Ft. Worth, Tex.

To St. Louis Southwestern Ry. Co. of Texas, Dr., for charges on articles transported from

| Billing Station and Route | Way-Bill Number and Date | Car Initial and Number |
|---|---|---|
| Carthage | S. L. T. J. 4 12-30 | S. F 95997 |

| Shipper | Original Point of Shipment | Original Car | Initial and Number |
|---|---|---|---|
| S. R. S. Co. | | | |

| Number of Packages, Articles and Marks | Weight | Rate | Freight Charges | Advances | Total |
|---|---|---|---|---|---|
| Carthage Stone | 80,000 | 27½ | 220.00 | | |
| | | | Total | 220.00 | |

Received payment for the Company 1-14, 1909.
W. H. Phillips, Agent, per Lehane.

All freight subject to Storage or Trackage according to current Storage and Car Service rules.
Agents must use indelible pencil and carbon paper. The use of lead pencil will not be permitted either on freight bill or receipt.



THIS PAG

71 Mr. HALLIBURTON: We offer exhibits S to W, inclusive, on the proposition the defendant stated he received the bill of lading from the railroad company and forwarded it to Texas.

Mr. HACKNEY: Object because the testimony shows these were not the original bills of lading.

Mr. HALLIBURTON: Offer it on the further ground that the defendant in demanding his refund for overcharge furnished these to the plaintiff.

Mr. HACKNEY: We object because the documents are not shown to be correct copies and the witness says he never compared these with the originals and could not say whether they contained all the notations on the original bills of lading.

The COURT: Sustained.

Mr. HALLIBURTON: Except.

Said Exhibits S to W, inclusive, being in words and figures as follows, to-wit:

72 EXHIBIT S.

Frisco System.

St. Louis and San Francisco Railroad Company.

Original not Negotiable.

12-29, 1908.

Received from Spring River Stone Co.

[On margin:] Agents must not in any case receipt beyond points on this road.

The following described packages in apparent good order (contents and value unknown), consigned and marked as numbered in the margin to be transported over the line of this road to — Station, and delivered in like good order to the consignee or owner at said station, or to such carrier (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or to the consignee.

The St. Louis and San Francisco Railroad Company guarantees that the rate for transportation from the place of shipment to — shall not exceed the rate noted on this bill of lading and charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate), on which this bill of lading is issued. This contract is subject to the following conditions:

The carrier will not receive on any train, Gold, or Silver, Coin, Bullion, or manufactured Articles of Gold and Silver, Jewels and Watches, Bank Bills, Drafts, Notes, Deeds, Contracts, Mail Matter, Valuable Papers or other writings and no agent or conductor is

authorized to take charge of same; and if shipped secretly or
73 with other property, unknown to the officers and agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employes.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgment on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages, the contents of which are unknown; for the leakage of any kind of Liquids, breakage of any kind of glass, Carboys of Acid or articles
74 packed in glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and iron articles, or for the condition of baling of, or loss or damage on Hay, Hemp, Cotton, or any article whose bulk renders it necessary to transport on open cars or for damage to perishable property of any kind occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by Providential causes or by fire from any cause whatever, while in transit or in stations, or for loss of Flour or any other property, caused by bad or insufficient cooperage, or for loss or damage on the lakes and rivers, unless it can be shown that such damage or loss occurred through the negligence of the particular carrier sought to be held responsible. It is further agreed, that for all loss or damage occurring in the transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any

property for which any carrier may be responsible under the Bill of Lading, the value of cost of the same at the point and time of shipment is to govern the settlement, unless the valuation is otherwise released on this Bill of Lading. All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for accidents or delays from unavoidable causes. No carrier shall be responsible for delay, loss or damage by strikes or riots.

All freight shall be subject to transfer enroute, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive. In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods for all claims for damage by chafing in transit.

75 Freight must be removed from the station during business hours on the day of its arrival, at destination or shall be stored at the owner's sole risk and expense. All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours detention, or fractional part thereof, after the expiration of twenty-four hours from its arrival at destination.

This Bill of Lading must be presented without alteration or erasure. The original Bill of Lading only is transferable. Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

| Marks, consignee and destination. | Articles. | Weight Subject to corrections. |
|---|---|---|
| J. B. Huffman, Ft. Worth, Tex. | Stone Car No. 93997 S. F. | 56,000 |

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

(Copy) O. K. A. W. Munday.
(Paid Claim.)
(P. T. 68299.)
(St. L. S. W. Ry. Co. of Tex.)

76 EXHIBIT T.

Frisco System.

St. Louis and San Francisco Railroad Company.

Original not Negotiable.

12-19, 1908.

Received from Spring River Stone Co.

[On margin:] Agents must not in any case receipt beyond points on this road.

The following described packages in apparent good order (contents and value unknown), consigned and marked as numbered in the margin to be transported over the line of this road to — Station, and delivered in like good order to the consignee or owner at said station, or to such carrier (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or to the consignee.

The St. Louis and San Francisco Railroad Company guarantees that the rate for transportation from the place of shipment to — shall not exceed the rate noted on this bill of lading and charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate), on which this bill of lading is issued. This contract is subject to the following conditions:

The carrier will not receive on any train, Gold, or Silver, Coin, Bullion, or manufactured Articles of Gold and Silver, Jewels and Watches, Bank Bills, Drafts, Notes, Deeds, Contracts, Mail Matter, Valuable Papers or other writings and no agent or conductor is authorized to take charge of same; and if shipped secretely or
77 with other property, unknown to the officers and agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employés.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any

carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgment on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages, the contents of which are unknown; for the leakage of any kind of Liquids, breakage of any kind of glass, Carboys of Acid or articles packed in glass, Stoves or Stove Furniture, Castings, Machin-
78 ery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and iron articles, or for the condition of baling of, or loss or damage on Hay, Hemp, Cotton or any article whose bulk renders it necessary to transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by Providential causes or by fire from any cause whatever, while in transit or in stations, or for loss of Flour or any other property, caused by bad or insufficient cooperage, or for loss or damage on the lakes and rivers, unless it can be shown that such damage or loss occurred through the negligence of the particular carrier sought to be held responsible. It is further agreed, that for all loss or damage occurring in the transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the envent of the loss of any property for which any carrier may be responsible under the Bill of Lading, the value of cost of the same at the point and time of shipment is to govern the settlement, unless the valuation is otherwise released on this Bill of Lading. All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for accidents or delays from unavoidable causes. No carrier shall be responsible for delay, loss or damage caused by strikes or riots.

All freight shall be subject to transfer enroute, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive. In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of trans-

portation is released by the shipper of said goods for all claims for damage by chafing in transit.

79 Freight must be removed from the station during business hours on the day of its arrival, at destination or shall be stored at the owner's risk and expense. All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-for hours detention, or fractional part thereof, after the expiration of twenty-four hours from its arrival at destination.

This Bill of Lading must be presented without alteration or erasure. The original Bill of Lading only is transferable. Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

| Marks, consignee and destination. | Articles. | Weight subject to corrections. |
|---|---|---|
| J. B. Huffman, Ft. Worth, Tex. | Stone Car No. 1110 M. & N. A. | 51,000 |
| | Less 500 lbs. for stakes. | |

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

(Copy.) O. K. A. W. Munday.
(Paid Claim.)
(P. T. 68299.)
(St. L. S. W. Ry. Co. of Tex.)

80 EXHIBIT U.

Frisco System.

St. Louis and San Francisco Railroad Company.

Original not Negotiable.

12-15, 1908.

[On margin:] Agents must not in any case receipt beyond points on this road.

Received from Spring River Stone Co.

The following described packages in apparent good order (contents and value unknown), consigned and marked as numbered in the margin to be transported over the line of this road to — Station, and delivered in like good order to the consignee or owner at said station, or to such carrier (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and

shall cease when it delivers the same to a connecting carrier or to the consignee.

The St. Louis and San Francisco Railroad Company guarantees that the rate for transportation from the place of shipment to — shall not exceed the rate noted on this bill of lading and charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate), on which this bill of lading is issued. This contract is subject to the following conditions:

The carrier will not receive on any train, Gold, or Silver, Coin, Bullion, or manufactured Articles of Gold and Silver, Jewels and Watches, Bank Bills, Drafts, Notes, Deeds, Contracts, Mail Matter, Valuable Papers or other writings and no agent or conductor is authorized to take charge of same; and if shipped secretly or
81 with other property, unknown to the officers and agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employés.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgment on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages, the contents of which are unknown; for the leakage of any kind of liquids, breakage of any kind of glass, Carboys of Acid or articles packed in glass, Stoves or Stove Furniture, Castings, Machinery, Car-
82 riages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and iron articles, or for the condition of baling of, or loss or damage on Hay, Hemp, Cotton or any article whose bulk renders it necessary to transport on open cars,

or for damage to perishable property of any kind occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by Providential causes or by fire from any cause whatever, while in transit or in stations, or for loss of Flour or any other property, caused by bad or insufficient cooperage, or for loss or damage on the lakes and rivers, unless it can be shown that such damage or loss occurred through the negligence of the particular carrier sought to be held responsible. It is further agreed, that for all loss or damage occurring in the transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under the Bill of Lading, the value of cost of the same at the point and time of shipment is to govern the settlement, unless the valuation is otherwise released on this Bill of Lading. All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for accidents or delays from unavoidable causes. No carrier shall be responsible for delay, loss or damage caused by strikes or riots.

All freight shall be subject to transfer enroute, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive. In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods for all claims for damage by chafing in transit.

83 Freight must be removed from the station during business hours on the day of its arrival, at destination or shall be stored at the owner's sole risk and expense. All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty four hours' detention, or fractional part thereof, after the expiration of twenty-four hours from its arrival at destination.

This Bill of Lading must be presented without alteration or erasure. The original Bill of Lading only is transferable. Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

| Marks, consignee and destination. | Articles. | Weight, subject to corrections. |
|---|---|---|
| J. B. Huffman, Ft. Worth, Tex. | Stone Car No. 25096 L. & N. | 50,000 |
| | Less 500 lbs. for car stakes. | |

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

(Copy) O.K. A. W. Munday.

84

EXHIBIT V.

Frisco System.

St. Louis and San Francisco Railroad Company.

Original not negotiable. 12-4, 1908.

Received from Spring River Stone Co.

[On Margin:] Agents must not in any case receipt beyond points on this road.

The following described packages in apparent good order (contents and value unknown), consigned and marked as numbered in the margin to be transported over the line of this road to..... ..... Station, and delivered in like good order to the consignee or owner at said station, or to such carrier (if the same are to be forwarded beyond said station) whose lines may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or to the consignee.

The St. Louis and San Francisco Railroad Company guarantees that the rate for transportation from the place of shipment to ..... shall not exceed the rate noted on this bill of lading and charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate), on which this bill of lading is issued. This contract is subject to the following conditions:

The carrier will not receive on any train, Gold or Silver, Coin, Bullion, or manufactured Articles of Gold and Silver, Jewels and Watches, Bank Bills, Drafts, Notes, Deeds, Contracts, Mail Matter, Valuable Papers or other writings and no agent or conductor is authorized to take charge of same; and if shipped secretly or with other property; unknown to the officers and agents of the
85 carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owners Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employés.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that

any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgement on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss for packages, the contents of which are unknown; for the leakage of any kind of Liquids, breakage of any kind of glass, Carboys of Acid or articles packed in glass, Stoves or Stove Furniture, Castings, Ma-
86 chinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and iron articles, or for the condition of baling of, or loss or damage on Hay, Hemp, Cotton or any article whose bulk renders it necessary to transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by Providential causes or by fire from any cause whatever, while in transit or in stations, or for loss of Flour or any other property, caused by bad or insufficient cooperage, or for loss or damage on the lakes and rivers, unless it can be shown that such damage or loss occurred through the negligence of the particular carrier sought to be held responsible. It is further agreed, that for all loss or damage occurring in the transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under the Bill of Lading, the value of cost of the same at the point and time of shipment is to govern the settlement, unless the valuation is otherwise released on this Bill of Lading. All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for accidents or delays from unavoidable causes. No carrier shall be responsible for delay, loss or damage caused by strikes or riots.

All freight shall be subject to transfer enroute, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive. In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of trans-

portation is released by the shipper of said goods for all claims for damage by chafing in transit.

87 Freight must be removed from the station during business hours on the day of its arrival, at destination or shall be stored at the owner's sole risk and expense. All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of twenty-four hours from its arrival at destination.

This Bill of Lading must be presented without alteration or erasure. The original Bill of Lading only is transferable. Copies are furnished for the information of those concerned, bu. are otherwise valueless, except as evidence that a Bill of Lading has been issued.

| Marks, consignee and destination. | Articles. | Weight, subject to corrections. |
|---|---|---|
| J. B. Huffman, Ft. Worth, Tex. | Stone Car No. 9193 C. of G. Less 500 lbs. for stakes. | 50,000 |

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

(Copy.) O. K. A. W. Munday.

88 EXHIBIT W.

Frisco System.

St. Louis and San Francisco Railroad Company.

[On margin:] Agents must not in any case receipt beyond points on this road.

Original not negotiable.

11-30, 1908.

Received from Spring River Stone Co.

The following described packages in apparent good order (contents and value unknown), consigned and marked as numbered in the margin to be transported over the line of this road to —— Station, and delivered in like good order to the consignee or owner at said station, or to such carrier (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or to the consignee.

The St. Louis and San Francisco Railroad Company guarantees that the rate for transportation from the place of shipment to —— shall not exceed the rate noted on this bill of lading and

charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate), on which this bill of lading is issued. This contract is subject to the following conditions:

The carrier will not receive on any train, Gold, or Silver, Coin, Bullion, or manufactured Articles of Gold and Silver, Jewels and Watches, Bank Bills, Drafts, Notes, Deeds, Contracts, Mail Matter, Valuable Papers or other writings and no agent or conductor is authorized to take charge of same; and if shipped secretly or
89 with other property, unknown to the officers and agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owners Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employés.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgment on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages, the contents of which are unknown; for the leakage of any kind of Liquids, breakage of any kind of glass, Carboys of Acid or articles
90 packed in glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of iron and iron articles, or for the condition of baling of, or loss or damage on Hay, Hemp, Cotton or any article whose bulk renders it necessary to transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvas, or for loss or damage to freight occasioned by Providential causes or by fire from any cause whatever, while in transit or in

stations, or for loss of Flour or any other property, caused by bad or insufficient cooperage, or for loss or damage on the lakes and rivers, unless it can be shown that such damage or loss occurred through the negligence of the particular carrier sought to be held responsible. It is further agreed, that for all loss or damage occurring in the transit of freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under the Bill of Lading, the value of cost of the same at the point and time of shipment is to govern the settlement unless the valuation is otherwise released on this Bill of Lading. All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for accidents or delays from unavoidable causes. No carrier shall be responsible for delay, loss or damage caused by strikes or riots.

All freight shall be subject to transfer enroute, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive. In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods for all claims for damage by chafing in transit.

91 Freight must be removed from the station during business hours on the day of its arrival, at destination or shall be stored at the owner's sole risk and expense. All carload freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of twenty-four hours from its arrival at destination.

This Bill of Lading must be presented without alteration or erasure. The original Bill of Lading only is transferable. Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

| Marks, consignee and destination. | Articles. | Weight, subject to corrections. |
|---|---|---|
| J. B. Huffmann, Ft. Worth, Tex. | Stone. Car No. 94134 C. S. N. O. & P. | 50,000 |
| | Less 500 lbs. for stakes. | |

Via Frisco c/o Cotton Belt at Jonesboro, Ark.

(Copy.) O. K. A. W. Munday.

92 Plaintiff rests.

At the close of the plaintiff's case, the defendant asked the Court to give the following instruction in the nature of a demurrer, as follows:

The Court instructs the jury, that under the pleadings and evidence the plaintiff cannot recover and your verdict must be for defendant.

Which said instruction was by the Court given over the objection and exception of the plaintiff.

And afterward, on the same day, and during said regular term of said court, to-wit: On March 6th, 1912, the jury returned into court the following verdict:

"We, the jury, find the issues in favor of the defendant."

WILL CRAIG, *Foreman.*

And afterward, on the same day, to-wit: March 6th, 1912, and during said regular term of said court, judgment was entered of record in this cause, to which entry of judgment the plaintiff at the time duly excepted and still excepts.

And afterward, during said regular term of court, and within four days after the rendition of the verdict aforesaid, to-wit: on the 8th day of March, 1912, the plaintiff filed its motion for a new trial in said cause as follows:

93 "In the Circuit Court of Jasper County, Missouri, February Term, 1912.

No. 16308.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff,
vs.
SPRING RIVER STONE COMPANY, Defendant.

Now comes the plaintiff and moves the court to set aside the verdict in this cause and grant the plaintiff a new trial for the following reasons, to-wit:

1. Because the Court erred in refusing to admit proper and legal testimony offered by the Plaintiff;

2. Because the Court erred in admitting improper and illegal testimony offered by the defendant;

3. Because the Court erred in giving defendant's preemptory instruction to find for the defendant; at the close of the evidence.

4. Because, under the law and the evidence that case should have been submited to the Jury;

5. Because under the law and the evidence the Court should have instructed the Jury to find for the plaintiff instead of for the defendant.

McREYNOLDS & HALLIBURTON,
*Attorneys for Plaintiff.*

Which said motion coming on to be heard, was, by the Court, on the 9th day of March, 1912, and during said regular term of Court, overruled, the plaintiff at the time duly excepting and now excepting to the action of the Court in overruling said motion.

Thereupon, on the 9th day of March, 1912, and during said regular February 1912 term of court, the plaintiff filed its affidavit
94 for an appeal, and paid docket fee of $10.00 as required by law and an appeal was allowed by the Court to the Springfield Court of Appeals, and plaintiff given until on or before the third day of the June, 1912 Term of this Court within which to file its bill of exceptions.

Said affidavit in appeal, being in words and figures as follows:

"*Affidavit for Appeal to Supreme or Appellate Court.*

In the Circuit Court of Jasper County, at Carthage, Mo., February Term, 1912.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff,
vs.
SPRING RIVER STONE COMPANY, Defendant.

J. W. Halliburton, Agent and Attorney for the plaintiff in the above entitled cause, being sworn, upon his oath says, that the appeal prayed for by plaintiff is not made for vexation or delay, but because affiant believes the plaintiff aggrieved by the judgment and decision of the Court.

J. W. HALLIBURTON.

Subscribed and sworn to before me, this 9th day of February, 1912.

[SEAL.]

DELLA A. SHARPE, *Clerk*,
By A. E. TAGGART, *D. C.*"

The Order of record granting said appeal is as follows:

(Caption Omitted.)

Now comes the plaintiff and files herein its affidavit for an appeal in this cause, said affidavit being by the Court examined and
95 deemed sufficient an appeal in this cause is granted to the Springfield Court of Appeals, the plaintiff having deposited the $10.00 docket fee in said court required by law.

And now here on this 13th day of April, 1912, and within the time so allowed by the Court for filing Bill of Exceptions herein, the plaintiff presents this, its bill of exceptions and prays the Court that the same may be signed, sealed and make a part of the record herein, which is accordingly done.

Witness my hand as Judge of said Division of said Court, this the day and year last above written.

[SEAL.]

D. E. BLAIR,
*Judge of Division Number Two,*
*Jasper County Circuit Court.*

Filed April 13, 1912. Della A. Sharpe, Clerk.

The above is a complete abstract of the record of all the proceedings had in said cause in the Circuit Court.

All of which is respectfully submitted for the consideration of this Court.

S. H. WEST,
ROY F. BRITTON,
McREYNOLDS AND HALLIBURTON,
*Attorneys for Appellant.*

96 STATE OF MISSOURI, *set:*

I, George H. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the abstract of the record, as filed in the foregoing entitled cause, as fully as the same appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals. Done at office in Springfield, State aforesaid, April 10th 1913.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL, *Clerk,*
By —— ——, *D. C.*

97 UNITED STATES OF AMERICA:

In the Springfield Court of Appeals for the State of Missouri.

In obedience to the commands of the writ of error directed to the Judges of the Springfield Court of Appeals, in the case of St. Louis & Southwestern Railway Company of Texas, plaintiff in error, versus Spring River Stone Company, I herewith transmit to the Supreme Court of the United States, a duly certified copy of the printed abstract of proceedings in said cause in the Circuit Court of Jasper County, Missouri, a copy of the judgment of the Circuit Court of Jasper County, Missouri, Certified copies of the opinions handed down by W. R. Robertson, Presiding Judge, concurring opinion by John T. Sturgis, Judge, dissenting opinion by John S. Farrington, Judge, and also the petition for a writ of error, assignment of errors, order allowing the writ of error, copy of the bond, and approval thereof, writ of error and citation to defendant in error, with acknowledgment of service thereon and præcipe for transcript, service duly acknowledged thereon.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Springfield Court of Appeals, this 18th day of April, 1913.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
*Clerk of the Springfield Court of Appeals.*

98 In the United States Supreme Court.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff in Error,
vs.
SPRING RIVER STONE COMPANY, Defendant in Error.

*Præcipe for Transcript.*

Plaintiff in error in the above entitled cause, hereby requests the Clerk of the Springfield Court of Appeals of the State of Missouri, to embody in the transcript of the record to be forwarded to the United States Supreme Court, the following matters:

First. Abstract of the record of the proceedings in the Circuit Court of Jasper County.

Second. Certified copy of the judgment of the Circuit Court of Jasper County.

Third. The opinion of Presiding Judge Robertson.

Fourth. The concurring opinion of Judge Sturgis.

Fifth. Dissenting opinion of Judge Farrington.

Sixth. Petition for writ of error, assignment of errors, order allowing writ of error, bond and approval thereof, writ of error and citation to defendant in error, with acknowledgment of service thereof.

S. H. WEST,
COLLINS, BARKER AND BRITTON,
*Attorneys for Plaintiff in Error.*

Filed. George H. Daniel, Clerk of the Springfield Court of Appeals.

Service of the above Præcipe acknowledged this 12th day of April, 1913.

THOMAS & HACKNEY,
*Attorneys for Spring River Stone Co., Defendant in Error.*

99 STATE OF MISSOURI.
*County of Jasper, ss:*

In the Circuit Court of Jasper County, Missouri, February Term, 1912, at Carthage, Division Number Two.

Be It Remembered, That on the 6th day of March, 1912, the same being the 15th judicial day of said term of said Court, the following among other proceedings were had, to-wit:

16038.

THE ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Pl'ff,
vs.
SPRING RIVER STONE COMPANY, Def't.

Now, at this day, this cause comes on for trial, the plaintiff appears by S. H. West, and McReynolds & Halliburton, its Attorneys, the defendant appears by Thomas & Hackney, its Attorneys, and both parties announce ready for trial; whereupon comes the following panel of jurors, to-wit: 1. W. A. Glazebrook; 2. I. P. Rawbell; 3. J. J. Seymour; 4. J. W. Weaver; 5. Clint Swartz; 6. Will Craig; 7. Howard Batis; 8. S. E. Cooley; 9. C. Sigler; 10. John Bowers; 11. W. C. Campbell; 12. Henry Shelton, twelve good and lawful men, resident citizens of Jasper County, Missouri, and qualified by law to serve as jurors, who are duly impaneled, sworn and charged, and the trial of this cause is begun; at the conclusion of the plaintiff's testimony, by direction of the court, the jury returns the following verdict, to-wit: We, the jury, find the issues in favor of the defendant. Will Craig, Foreman.

It is therefore ordered and adjudged by the Court that the plaintiff take nothing by its suit herein; that the defendant be discharged and go hence hereof without day, and recover of and from the plaintiff the costs of this cause, and that execution issue therefor.

100 And thereafter, to-wit: on the 9th day of March, 1912, the same being the 18th judicial day of said term of said court, among others the further following proceedings were had in said cause, to-wit:

16038.

THE ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Pl'ff,
vs.
SPRING RIVER STONE COMPANY, Def't.

Now comes the plaintiff and files herein its affidavit for an appeal in this cause; said affidavit being by the Court examined and deemed sufficient, an appeal in this cause is granted to the Springfield Court of Appeals; the plaintiff having deposited the $10.00 docket fee in said Court required by law.

STATE OF MISSOURI,
*County of Jasper, ss:*

I, Della A. Sharp, Clerk of the Circuit Court within and for the County of Jasper, in the State of Missouri, hereby certify that the above and foregoing is a full, true and complete copy of the judg-

ment and order granting an appeal in the cause therein named, as the same appear of record in my office.

In Testimony Whereof, I hereunto set my hand as such Clerk, and affix the seal of said Court. Done at office in the City of Carthage, in said County and State, this the 15th day of February, 1912.

[SEAL.]

DELLA A SHARP, *Clerk*,
By JAS. M. BURKE, *D. C.*

101 In the Springfield Court of Appeals, October Term, 1912, January Call, 1913.

No. 910.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
vs.
SPRING RIVER STONE COMPANY, Respondent.

Appeal from Jasper Circuit Court, Division No. Two.

Hon. D. E. Blair, Judge.

S. H. West, Roy F. Britton and McReynolds & Halliburton, for Appellant.

Thomas & Hackney, for Respondent.

Affirmed.

ROBERTSON, *P. J.*:

Plaintiff sued defendant in the circuit court to recover $23.12 from defendant and based its claim thereto on the following facts: In 1908 defendant was operating a stone quarry at Carthage, Missouri, and was negotiating with one J. B. Hoffman of Ft. Worth, Texas, for the sale of five cars of stone to be delivered to Hoffman at Ft. Worth. Defendant called upon the commercial agent of the plaintiff for a quotation of freight rates and received a quotation of 27½ cents per hundred pounds on cars of 50,000 pounds minimum capacity, the agent designating the St. Louis & San Francisco Railroad Company, which had a station and freight office at Carthage, as the initial carrier. Upon this information the defendant quoted Hoffman a price on five 50,000-lb. cars of stone to be delivered at Ft. Worth. This offer was accepted and the defendant company ordered 50,000-lb. cars in each case, but not having that capacity accessible the railroad company furnished in each case cars of greater marked capacity than were ordered by the defendant.

102 Defendant loaded the stone and estimated the weight, according to its dimensions, which was approximately correct, but as the railroad company had no facilities at Carthage for weighing the cars they were not weighed by the railroad company until they reached Monett en route to their destination. The correct weight

was slightly in excess of the estimated weight. The shipments were made between November 30, 1908, and December 29th of the same year and when the shipments reached the destination plaintiff attempted to exact freight according to the marked capacity of the cars instead of according to the capacity ordered, though in fact the amount paid by the defendant corresponded neither to the actual nor the estimated weight of the shipments and was $30.52 less than the freight would have amounted to upon the marked capacity of the cars. On February 4, 1909, before defendant knew the actual weight of the shipments, it made a written demand upon the claim agent of plaintiff for $287.78 overcharge, giving the estimated weight. After making this claim the defendant on February 6, 1909, after learning the correct weight of the cars, reduced its claim to $263.73; and thereafter the commercial agent of the plaintiff went to Carthage, made a full investigation and soon thereafter the defendant was paid $270.60 on account of the supposed overcharge.

The plaintiff bases its right to recovery in this case upon the theory that the Act of Congress, commonly called the Interstate Commerce Act, to regulate commerce and the tariffs and schedules filed in obedience thereto, fixed the rate on this character of shipments at 27½ cents per hundred pounds when the cars ordered and used were loaded to their capacity, but that by virtue of a rule then applicable in this territory that when the carrier could not furnish a car of the capacity ordered by the shipper and for its own convenience provided a car of greater capacity than the one ordered by the shipper, it might use this car on the basis of the minimum carload weight fixed in the tariff applied on the size of the car ordered by the shipper, but in no case less than the actual weight, the capacity of car ordered, number of the order and
103 date of same to be shown in each instance on the bill of lading and the carrier's way bill, and that in this instance the required notations were not made on the way bill nor on the bill of lading and that, therefore, the plaintiff in the first instance should have collected 27½ cents per cwt. on the marked capacity of the cars

It was conceded at the trial by plaintiff's counsel that when the defendant made its claim for the rebate and when the plaintiff adjusted and paid it that there was no intention upon the part of either of them to violate the law.

The trial below was to a jury and at the conclusion of the plaintiff's testimony the court directed a verdict in favor of the defendant. There is no controversy here as to the facts material to a decision of this case.

In the case of State ex rel. vs. Ewing, 116 Mo., 129, 22 S. W. 785, an action was brought upon the official bond of the county collector to recover certain sums retained by him on settlements for commissions in excess of what was due him under the law. The defendants in that case, as in this, pleaded the settlements in bar, and at the conclusion of the testimony the court directed a verdict for the defendants. That case in principle is not different from this. The facts in that case were that the county collector had charged and withheld greater commissions on sums collected than he was allowed

by law but the contention in behalf of the county was that as the commissions had been allowed by the county court upon a settlement with it contrary to law the defendants could not plead settlement. The defendants' contention was that notwithstanding the collector was allowed by the county court upon a settlement more by way of commissions than he was entitled to receive, the settlement with the county court had the binding force and conclusiveness of a judgment and could only be attacked by a direct proceeding in equity on the ground of fraud or mistake. This contention was ruled against the defendants and it was held that the settlement could be inquired into and mistakes corrected in like manner as between individuals acting in their own behalf, and it was held that the settlement was binding on the county. A similar case is also found in State ex rel v. Shipman, 125 Mo., 436, 28 S. W. 842.

104 In the case of Corbin v. Adair County, 171 Mo., 385, 71 S. W. 674, the circuit clerk undertook to recover fees paid by him into the county treasury under a mistake of fact, to which he was as a matter of law entitled at the time of his payment, but the court held that his action could not be maintained. To the same effect also is the opinion in the case of Hethcock v. Crawford County, 200 Mo. 170, 98 S. W. 582.

While it may be true, as contended by plaintiff, that the parties to this litigation could not have entered into a binding agreement for a different rate from that fixed by the rules, tariffs, etc. under the Act of Congress, nevertheless they have settled, as between themselves, their respective civil liabilities on account of the shipments, and it is as essential in this case as in the cases where public officals received more than they were entitled to by law, that the right of controversy between the parties be foreclosed by their settlement: and it is our duty to follow the decisions of the Supreme Court. The judgment of the circuit court is affirmed.

Sturgis J. concurs in the result in a separate opinion.

Farrington, J. dissents in a separate opinion.

W. R. ROBERTSON, *Judge*.

STATE OF MISSOURI:

I, George H. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the Opinion in the above entitled cause as fully as the same remains on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court. Done at office in Springfield, Missouri, this the 3 day of March, 1913.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL, *Clerk*.

105 [Endorsed:] 16038. No. 910. St. L. & S. W. Ry. Co., Appellant, vs. Spring River Stone Co., Respondent. Jasper. Opinion of the Court by W. R. Robertson, Judge. Filed Mar. 18, 1913. Della Sharp, Clerk. Filed ——, 19—. George H. Daniel, Clerk. 2472.

106 In the Springfield Court of Appeals, October Term, 1912, January Call.

No. 910.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
v.
SPRING RIVER STONE COMPANY, Respondent.

Appealed from the Jasper County Circuit Court.

Hon. David E. Blair, Judge.

S. H. West, Roy F. Britton, and McReynolds & Halliburton for Appellant.
Thomas & Hackney for Respondent.

STURGIS, J., concurring:

I desire to say that I fully concur with Farrington J., in all he says in reference to the binding effect of the tariff rate filed by carriers with the Interstate Commerce Commission and that this effect is not dependent on the posting of the copies by the local agents. As said by Commissioner Harlan in Poor Grain Co. v. Railroad 12 Int. Com. Rep. 418, this published rate "is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of the Congress." The published rate is in itself a contract with all the world at the specified rate and can not be changed or modified by the carrier or shipper or
107 both combined. The Interstate Commerce Act deprives carriers and shippers of the power to make individual contracts by substituting one uniform contract filed with the commission. All that any agent of a carrier can do is to give information as to what that contract is and the posting of copies of the tariff rates in railroad offices is for no other purpose, and is not a condition precedent to putting the rates in effect.

The Act of Congress in question provides that "when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force." The Act further provides that it shall be "unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act." This means that common carriers shall not give or grant to any shipper any rate other

than the established published rate. They shall not do so for any purpose or in any manner. They shall not do so directly or indirectly. They shall not do so by contract, compromise or settlement. They shall not do so by payment under a mistake of law or fact. They shall not do so by means of any "rebate, concession or discrimination." C. & A. Railroad v. Kirby (1912) 32 Sup. Ct. Rep. 648.

I concur also with Farrington J., in holding that, as the last and all the decisions of our Supreme Court, on the question of the binding and overruling effect of the decisions of the U. S. Supreme
108 Court on the decisions of all state courts in matters pertaining to interstate commerce and the like, is to the effect that the Federal Supreme Court is the final arbiter to which all state courts must yield, then we are not to follow the decision of the Supreme Court of this state when overruled or plainly in conflict with the decisions of the United States Supreme Court. We have a right to presume, and our Supreme Court has in effect told this court to presume, that it will, at the first opportunity, make its decisions conform to the decision of the Federal Courts in such matters.

I am convinced however that the plaintiff railroad did in the first instance exact and collect more than the established rate fixed by the tariff schedule filed with the Interstate Commerce Commission, a thing it had no right to do under the law as we all agree; and, therefore, it would have been compelled to pay back such excess charges in an action at law.

It is conceded that under the facts as proven the defendant has paid, after deducting this refund, the full rate of "27½ cts. per hundred pounds" fixed and designated in "Texas Tariff No. 42-B", which was the tariff on file with the Commerce Commission and in force covering the shipment of this stone from Carthage, Mo. to Ft. Worth, Texas. The only claim is that the cars in which the stone was actually shipped were not loaded to their minimum capacity and under Item 81 of said Texas Tariff No. 42-B the railroad must charge and collect for the minimum capacity of the car used, whether loaded to such capacity or not; and so plaintiff is now seeking to recover from defendant an amount in excess of the regular rate of 27½ cents per hundred pounds on the freight actually shipped. It will be noted that this Item 81 provides that cars of a larger minimum capacity may be furnished to and used by the shipper without subjecting him to payment for excess weight up to the minimum capacity, provided such shipper has ordered a car of less minimum capacity and the carrier for its own convenience furnished a car of larger minimum capacity than is ordered.
109 In the instant case the jury found, and that is binding on this court, that the shipper did order a car of less minimum capacity and brought himself within the rule; and that it is solely the fault of the carrier that the smaller minimum capacity car was not furnished and used.

But plaintiff further claims that, notwithstanding it was its fault in not furnishing the smaller car ordered, yet the shipper can not rely on this fact as constituting an exception to the rule exempting him from payment of freight based on the minimum capacity of

the car used, unless the capacity of the car ordered is noted on the bill of lading and carrier's way bill.

The very nature and definition of a bill of lading requires that it be issued by the carrier and it is not necessarily or generally signed by the consignor, and may or may not contain contractual provisions. 6 Cyc 416 & 417. Section 20 of the Interstate Commerce Act expressly requires common carriers receiving property for transportation to "issue a receipt or bill of lading therefor;" and penalties are provided for issuing false bills of lading. Under the power given it the Interstate Commerce Commission has provided for the use of uniform bills of lading by all railroads doing an interstate business. Of course it makes no difference whether the carrier or shipper performs the clerical work of filling out the blank forms. It is the carriers' bill of lading.

With reference to the "Carrier's Way Bill," on which the notation is also required to be made, the shipper does not so much as even see that. And it may be here remarked that the plaintiff did not even attempt to prove that the way bill here used did not contain the proper notation.

The writer fully agrees with Farrington J., that equality and uniformity of freight rates is the polar star of construction of the Interstate Commerce Act and all rules and regulations thereunder. But to hold that a shipper, who had ordered a car of a certain minimum capacity and loads the car furnished him on that order and pays the full established tariff rate on the commodity loaded
110 and shipped by him in such car, must pay a higher rate because the carrier fails to furnish the size car ordered and then further fails to note on the bill of lading or way bill its reason for furnishing a larger car, does not tend to promote uniformity and equaliy of freight rates. A more just and effectual remedy will be found in the penalty provisions for issuing false bills of lading: not meaning, however, to imply by this that this is a proper case for invoking such remedy.

The provision of the tariff schedule in question, permitting plaintiff to substitute larger cars than those ordered, is plainly for its benefit and so this Item No. 81 says. Seeing that the shipper must under all circumstances pay freight on every pound that he puts in the car, it is not apparent how he would ever profit by having a larger car than he orders or in having a bill of lading and way bill, even if he could control these instruments, omit the notation claimed to be necessary to entitle him to a charge based on less than the minimum capacity of the car used. It is in this particular instance, and would be generally, to the advantage of the carrier, if it is allowed to recover.

This line of reasoning finds support in the ruling of the Interstate Commerce Commission in So. Cotton Oil Co. v. L. & N. R. R. Co., 18 Interstate Com. Rep. 180; So. Cotton Oil Co. v. So. Ry. Co., 19 Interstate Com. Rep. 79; Miller & Lux v. So. Pac. Co., 20 Interstate Com. Rep. 129.

To allow plaintiff to prevail in its contention here is to allow it to take advantage of and reap a benefit from its own wrong; and

this is never allowed where there is no overshadowing reason for doing so.

It would seem that the provision for requiring the notation to be made by the carrier on the bill of lading and way bill is like the provision for posting the tariff schedules in the carrier's local offices in that it is directory rather than a condition precedent, and is to be done to afford a ready means of checking up the
111 transactions of such carriers.

Should the Interstate Commerce Commission find it necessary or desirable to require all orders for cars to be in writing so as to avoid misunderstanding as to the kind of cars ordered it has power to do so but has not done *do* in the Tariff schedule herein mentioned.

The writer therefore dissents from that portion of the opinion of Farrington J., dealing with this question and thinks the judgment should be affirmed.

JOHN T. STURGIS, *Judge.*

STATE OF MISSOURI,
*County of Greene, ss:*

I, Geo. H. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that the above is a true copy of the concurring opinion filed in the above entitled cause, as fully as the same appears on file in my office.

In testimony whereof: I Have hereunto set my hand and affixed the seal of said Springfield Court of Appeals. Done at office in Springfield, State aforesaid: 3 day of March, 1913.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL, *Clerk,*
By —— ——, *D. C.*

112 [Endorsed:] 16038. No. 910. St. L. S. W. Ry. Co., App. vs. Spring River Stone Co., Resp. Concurring Opinion. Opinion of the Court by Jno. Sturgis, Judge. Filed 3, 3, 1913. Geo. H. Daniel, Clerk. 2472. Filed Mar. 18, 1913, Della Sharp, Clerk.

113 In the Springfield Court of Appeals, October Term, 1912, January Call, 1913.

No. 910.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
vs.
SPRING RIVER STONE COMPANY, Respondent.

Appealed from the Jasper County Circuit Court.

Hon. David E. Blair, Judge.

Division Number Two.

*Dissenting Opinion of Farrington, J.*

Statement.—The respondent, operating a stone quarry at Carthage, Missouri, received a request from one J. B. Hoffman of Ft. Worth, Texas, for quotations on five cars of stone. Respondent thereupon called upon the commercial agent of the appellant for quotations of rates and received a letter quoting twenty-seven and one-half cents per hundred pounds on cars of 50,000 pounds minimum capacity. Respondent then made a bid for delivered price of the stone, and this bid was accepted. The appellant was notified that respondent would require five cars, each of 50,000 pounds minimum capacity, in which to ship the stone, the cars to be routed on the St. Louis & San Francisco Railroad to Jonesboro, Arkansas, and from there on the appellant's route to Ft. Worth, Texas. The respondent's agent ordered the cars as they were needed over the telephone, and in each instance ordered a 50,000 pound capacity car. There being a scarcity of such cars, the company for its own convenience furnished five cars of 80,000 pounds minimum capacity each. The respondent loaded these 80,000 pound capacity cars as though they had been 50,000 pound capacity cars. When

114 the shipment reached Ft. Worth, the consignee was called upon and required to pay freight on the basis of 80,000 pound capacity cars instead of on the basis of 50,000 pound capacity cars, making the difference in the total amount that he was required to pay (as appellant figured on the basis of 80,000 pound capacity cars), $270.60 more than would have been required on five 50,000 pound capacity cars. The respondent in due time made claim for that amount, and the appellant sent its adjusting agent and representative to Carthage, who, after going over the entire matter with the railroad company's agent and the officers of the respondent, agreed with them that they had been overcharged and repaid them the sum of $270.60. The appellant later claimed that under the tariff schedules and rates prescribed by the Interstate Commerce Commission the repayment of the $270.60 was a violation of the rules and regulations of the Interstate Commerce Commission, and

that respondent not only owed the $270.60 which had been repaid, but an additional amount, making the total amount alleged to be due the appellant, $323.12, and that this amount was due by a correct figuring of the rate on the cars in which the stone was actually shipped. The appellant demanded payment of the respondent which was refused and suit was instituted in the circuit court of Jasper county.

The plaintiff (appellant) introduced in evidence at the trial the copies of the tariffs filed with the Interstate Commerce Commission governing this shipment. Item 54 of this schedule provides that "the minimum weight will be the marked capacity of the car," etc. Plaintiff also introduced in evidence the following item:

"Supplement No. 6 to Texas Tariff 42-B. Effective November 29, 1908.

"Effective September 10, 1908. Stone: Building (not Granite or Marble), Flagging and Paving, Rough Quarried, Sawed or Dressed, Including Artificial Moulded Stone (not Polished, Lettered or Figured) and Stone crushed, minimum weight, 50,000 pounds, 27½ cents per 100 pounds from Kansas City territory to points taking Ft. Worth-Dallas Group Rates"

115 Plaintiff also introduced item No. 81, under the head of "Rules" in Texas Tariff No. 42-B, as follows:

"Minimum Weight Assessed, Based 81 on Capacity of Car Shipper May Order.

"The following rule will be observed in assessing the freight charges for minimum weights, according to capacity of car: 'When the carrier cannot furnish car of capacity ordered by shipper, and for his own convenience provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum carload weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight, capacity of car ordered, number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's way-bill.' In no case must shipment be billed at minimum weight of a car of less capacity than in service on initial line."

Plaintiff also introduced the following writing (being the same as four others introduced—one for each car) which the plaintiff insists on calling a bill of lading and which defendant insists on calling a shipper's ticket:

St. Louis and San Francisco R. R. Co.

CARTHAGE, MO., 12-18, 1908.

Will please receive the following freight to be forwarded subject to the Rules of Transportation, printed on its regular Shipping Bills, said rules being agreed to by the shippers, addressed to—
J. B. Hoffman, Ft. Worth, Tex.
Via Frisco c/o Cotton Belt at Jonesboro, Ark.

| No. and description of package. | Weight. |
|---|---|
| Stone. | |
| Car No. 1110, M. & N. A..... | 51,000 |
| Less 500 lbs. for stakes. | |

Not Negotiable.

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of Lading. All
116 conditions herein to the contrary are cancelled.
Shipper's Signature, Spring River Stone Co.
Agent's Signature, A. W. Munday.
SPRING RIVER STONE CO., *Shipper.*

At the close of plaintiff's evidence, the court directed a verdict for the defendant, and the case is here on plaintiff's appeal.

The issues presented to this court may be stated in small compass, viz: The respondent ordered by telephone five 50,000 pound capacity cars. The freight has been paid by respondent to cover the shipment if the stone had been shipped in 50,000 pound capacity cars. For the convenience of the appellant, 80,000 pound capacity cars were furnished. The Interstate Commerce Commission's rules require that freight be figured on the minimum marked capacity of the car used, unless there has been an order for a smaller capacity car than that furnished, in which event the minimum rate will be figured on the shipment according to the minimum carload ordered, provided the capacity of the car ordered, the number of the order, and the date of the same, be shown in each instance on the bill-of-lading and the carrier's way-bill. In the present case, no such notations appear; in the absence of which the appellant contends that it must collect, under the rules and regulations of the Interstate Commerce Commission, the total amount of freight, figured on 80,000 pound capacity cars. The respondent contends that it was the duty of the appellant to place these notations on the bill-of-lading and the way-bill, and that, in any event, after the appellant's attention had been called by them to a mistake in the amount of freight charged, and when their agent came to Carthage and investigated the whole matter and granted the demand of the respondent for a refund, that settled the matter so far as respondent and appellant were concerned. It is agreed that both respondent and appel-

lant in making the settlement at Carthage acted in good
117 faith and were settling under their understanding of the tariff schedules the exact amount of freight due.

It does not appear that the tariff schedules were posted in the depot, as provided by the rules of the Interstate Commerce Commission. Respondent did not file any counterclaim for damages for a failure to so post, or for damages for not making the proper notations on the bill-of-lading and way-bill.

*Opinion.*

FARRINGTON, *J.*:

It is no longer a mooted question that the shipper and carrier can not contract for a different rate on an interstate shipment than that prescribed by the schedules filed with the Interstate Commerce Commission and under the rules and regulations promulgated by it. And it can no longer be contended that it is not the law of the land that the shipper is conclusively presumed to know the schedule of rates and the rules and regulations of the Interstate Commerce Commission even though the carrier fail to post the tariffs as required in its various stations, whatever may have been held in this and other states to the contrary. The Constitution of the United States (Art. VI) provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, * * *"; and this certainly means that state courts are bound by the laws of the United States as construed by the federal Supreme Court.

In the case of Texas & Pacific Ry. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358, it is held that interstate freight rates are established when a schedule is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be posted as required by section 6 of the act to regulate com-
merce, as amended March 2, 1889, (25 Stat. at L. 855, Chap.
118 382, U. S. Comp. Stat. 1901, p. 3158) the posting merely affording special facilities to the public for ascertaining the rates actually in effect; and it is also held that the carrier and the shipper have no power to contract with reference to the rates—they being fixed by the schedule.

The case of Texas & Pacific Ry. Co. v. Mugg & Dryden, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, adopts the opinion of Chief Justice Brickell in the case of Southern R. Co. v. Harrison, 119 Ala. 539, 24 So. 552, in which the following language was used: * * * "whatever be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other states are bound."

In the case of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, it was held that suits could not be brought in the state courts by shippers against carriers to test the reasonableness of and to recover an alleged overcharge when the rate charged by the carrier was in accord with the scherule filed with the Interstate Commerce Commission, the reason therein pointed out being that different courts and juries passing on the cases brought before them could not and would not fix the "reasonable amount" to be the same, from which there would necessarily flow confusion in the rates to be charged and there would follow discrimination in favor of some and against others, which would, in effect, destroy the purpose for which the act of Congress was enacted. The opinion in the case concludes as follows: "Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress through the
119 Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce."

Mr. Justice White, in the case of New York, N. H. & H. R. Co., 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272, 277, used this language: "The all-embracing prohibition against either directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer." And this language was approved in the case of Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

That the shipper and the carrier cannot fix a different rate from that fixed in the schedule is again held in the case of Kansas City Southern Ry. Co. v. Albers Com. Co., 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

In the case of Robinson v. Baltimore & O. R. Co., 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, it is held that before a shipper may recover from the carrier the excess he claims to have paid under a regularly established and published rate which he attacks as unjustly discriminatory, he must, as a prerequisite have the investigation and appropriate finding of the Interstate Commerce Commission.

The decisions of this state hold that the fixing of the rate to be charged different from that fixed by the schedule is no longer
120 an open question. It is not a matter concerning which the shipper and carrier have a right to contract, either in the

initial contract for shipment, or in a subsequent contract of settlement or adjustment, or by a rebate. See, Dunne & Grace v. Railroad, 166 Mo. App. 372, 148 S. W. 997. In that case, a rate different from that fixed in the schedule filed with the Interstate Commerce Commission was agreed upon. When the consignment arrived at its destination in Kentucky a greater amount was demanded of the shipper than that fixed by the schedule, which was paid under protest. The shipper brought suit to compel the carrier to refund the amount paid over and above that agreed upon, and in the trial court he prevailed. When the case reached the appellate court, it found that neither the amount agreed upon in the initial contract nor the amount charged at destination was the amount fixed by the schedule, and that court found what the schedule rate would be and directed the trial court to enter judgment for that amount. Similar holdings will be found in the cases of Drey & Kahn Glass Co. v. Railway Co., 156 Mo. App. 178, 136 S. W. 757, and Sutton v. Railroad, 159 Mo. App. 685, 140 S. W. 76.

In the enactment of the act under consideration, Congress was proceeding within its constitution-given right to regulate commerce among the several states, and, as at all times, had the general welfare of the nation and its people in view; and the law, as enacted, plainly shows that both of these features had a place in the minds of the lawmakers. The rate fixed for the transportation of freight is a fact fixed by law, as much so as that a dollar is one hundred cents, and an attempt to vary this fact by contract would be as ineffectual as an attempt by contract to change the fact that one dollar is one hundred cents.

In the case of Wabash R. Co. v. Sloop, 200 Mo. 198, 98 S. W. 607, it was held that the schedule must be posted by the carrier and that proof of such posting is necessary in order for the carrier to recover the difference between the amount paid and the schedule rate. It will be noted, however, that this case was decided in December, 1906, prior to the decision of the Supreme Court of the United States in the case of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., and in the case of Texas & Pacific Ry. Co. v. Cisco Oil Mill, both supra, the latter case being directly opposed to the holding in Wabash R. Co. v. Sloop.

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The Supreme Court of the United States being the final arbiter on this question, its decisions are the law of the land and must be followed by all other courts, whether state or federal; and when that tribunal has passed upon a question as to which it is the final arbiter, it becomes this court's duty to fall in line with that decision, notwithstanding a different holding by the Supreme Court of this state. This rule has been often laid down for our guidance by our own Supreme Court and is reiterated in its last decision on the subject; thus, in Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895, it is held that the construction given a federal statute in the United States Supreme Court must be followed in the state courts, and in Briggs v. Holmstrong, 72 Mo. 337, it is said that a decision of the federal Supreme Court construing an act of Congress is conclusive on the courts of the state of Missouri; also, in Barber Arphalt Pav.

Co. v. French, 158 Mo. 534, 58 S. W. 934, it is held that where the facts of a case in a state court bring it within the operation of a rule laid down in a decision of the United States Supreme Court, such decision is binding on the state court. See, also, D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680; Mires vs. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 S. W. 1052. I therefore take it that it is our duty to follow the last ruling of the Supreme Court of the United States on the question involved in this case because it has to do with the construction of a
122 federal statute, and in doing so we are obeying the mandate of our own Supreme Court in saying that the construction of federal statutes by the federal Supreme Court is binding on all state courts.

The rule of law that forbids the opening of a settlement of a controversy or the adjustment of a difference between parties where there was a misunderstanding of the law does not apply to the present case for the reason that in all such cases where it is so held the parties settling had the power to contract in their own right or were by virtue of law given the authority to settle, while in the present case the act of Congress has taken that power entirely away from both the carrier and the shipper. Such must necessarily be the case on this question of rates and the regulation of freight charges in order that the very purpose of the act, to-wit, equality, shall be universally maintained and discriminations or favors done away with. No confusion will arise if this principle be kept in view as the guiding star in deciding these questions. It can be seen that the object and purpose of the law would be defeated by allowing refunds and rebates under the guise of settlements where alleged or supposed mistakes had been made, and Congress, having in mind this very condition took away from both parties to the contract the power to change the rate in any particular in any manner. They are prohibited from contracting in their own right with reference to the rate, and to make the law in any measure effective they must necessarily be prohibited from compromising or settling their differences as to rates. The permission to do the one and not the other would destroy at one blow the purpose of the law.

As we have stated, in the case of Robinson v. Baltimore & O. R. Co., supra, it was held that it was a prerequisite to a recovery by the shipper from the carrier of the excess claimed to have been paid under a regularly established and published rate which he attacks as unjustly discriminatory that he have the proper investigation and finding of the Interstate Commerce Commission. If this, then, be the law, how could the settlement between the shipper and the carrier in this case be relied upon when they merely agreed upon
123 an amount which was not the amount fixed by the schedule and the rules and regulations of the Interstate Commerce Commission? It would surely be as necessary a prerequisite to have the finding of the Interstate Commerce Commission on this question in a settlement, in order to make the settlement binding, as in a recovery in a court of law.

It is, however, contended in this case that the shipper paid the full

amount of the freight actually hauled, and that the shipper was not responsible for the failure of the carrier to furnish it the cars it ordered and that it should therefore not be compelled to pay the freight on the 80,000 pound capacity cars when it in fact ordered 50,000 pound capacity cars; and that it was the duty of the carrier and not the duty of the shipper to see that the proper notations were on the bill-of-lading and way-bill as provided by item 81 of the rules and regulations of the Interstate Commerce Commission which has to do with the fixing of rates when this condition exists. If it be held that it was the duty of the carrier to see that these notations were made and that its failure to make them would furnish an excuse to evade the schedule rate, the gate is opened wide for discrimination. The shipper, under the decisions cited, must know the rate to be charged and the basis on which it is charged. As much discrimination could be made by a varying of the capacity of the car used as by a reduction of the amount to be paid per hundred pounds. In other words, I do not believe the rate fixed stops with the 27½ cents per hundred pounds, but that the rate fixed is 27½ cents per hundred pounds figured on the basis of the minimum capacity car used, which, in this case, was a car of 80,000 pounds capacity. This is constructively known as well by the shipper as by the carrier, and where the shipper actually uses a larger car than the one which he ordered he must know that under the schedule filed with the Interstate Commerce Commission he
124 must pay on the basis of that car, unless, for his protection and benefit there is placed on the bill-of-lading and the way-bill the proper notations. Rule 81 is not only for the convenience of the carrier in permitting it to furnish a larger car than is ordered, but affords a protection to the shipper as well—that is, when the carrier exercises its right to furnish a larger car than is ordered, if the proper notations are made the shipper will not have to pay on the minimum marked capacity of the car used, which is the general rule. To leave this an open question would necessarily mean discrimination, for, as held in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., supra, one court and jury might find that it is the shipper's duty and another might hold that it is the carrier's duty and still another might hold that there is a joint duty to see that the proper notations are made. In the one case or the other we would have a shipper getting his freight hauled cheaper than his competitor. Again, we must look to the guiding star which is that the freight rates be fixed, certain and equal as to all.

The recent case of Illinois Cent. R. Co. v. Elevator Co., decided by the Supreme Court of the United States on January 6, 1913, (Adv. Sheets, Feb. 15), holds that although there is a positive duty on the railroad company under the rules and regulations to post its schedule of rates, the shipper, although he alleges and proves a failure on the part of the railroad company to observe this rule and proves damages to himself by reason of its failure to post the tariffs, is not entitled to bring a suit in the state court for damages occasioned by such failure on the part of the company. Here was a rule and regulation applying only to the railroad company, a duty to be performed alone by

the carrier, yet it was held that the state court was not the tribunal to which the damaged shipper must apply for redress in the first instance. This and the other cases cited, show that the Supreme Court of the United States has held and intends to hold that where differences arise between shipper and carrier with reference to the rate to be charged under the rules and regulations of the Interstate Commerce Commission or with reference to the damages that may accrue for failure to perform certain duties that are required to be performed under said rules and regulations, the injured party, before he can proceed in the courts for redress must first get a finding and
125 order in his favor by the Interstate Commerce Commission. In other words, the Supreme Court of the United States in its decisions, as I understand them, holds that the carrier and the shipper must comply strictly with the tariffs and with the rules and regulations of the Interstate Commerce Commission regarding those rates and which shall govern their transactions, and that the courts are not given discretion to relieve against hard particular cases arising thereunder, lest exceptions become the rule.

Besides, when the bill-of-lading was delivered by the carrier to the shipper in this case, reduced to writing, so far as the contract of carriage and the amount of freight to be charged was concerned, this was fixed, and not subject to be varied or contradicted by oral testimony as to what the understanding was prior to the execution of the contract of carriage, it being a well-settled principle that the contract feature of a bill-of-lading is no more subject to change or modification by oral testimony than any other written contract; it is only to the receipt feature of the bill-of-lading that such oral testimony is admissible. It has been held in this state that it is the duty of the shipper to read his bill-of-lading, and unless it is by some device or artifice obliterated or rendered unintelligible, he is bound by its terms so far as the contractual feature is concerned. The St. Louis, K. C. & N. Ry. Co. v. Cleary, 77 Mo. l. c. 637; O'Bryan v. Kinney, 74 Mo. 125; Wyrick v. M., K. & T. Ry. Co., 74 Mo. App. 406; Patterson v. Railway Co., 56 Mo. App. l. c. 662; Mires v. Railroad, 134 Mo. App. l. c. 386, 114 S. W. 1052; Wood v. Steamboat Fleetwood, 22 Mo. l. c. 562.

The contention that the instrument set out in the statement in this opinion is not a bill-of-lading is untenable because it is an instrument issued by a carrier to a shipper in which the carrier receipts for the goods and agrees to haul them for a certain price, and it makes no difference so far as that is concerned whether the form was
126 furnished by the shipper or the carrier; it meets all the requirements of a bill of lading, and in fact was the only paper issued by the carrier to show the obligation in this transaction.

I do not believe it is necessary to decide whose duty it was to see that the proper notations appeared on the bill-of-lading and the way-bill. When the bill-of-lading was issued and accepted without them, the amount the shipper had to pay became fixed under the rules and regulations of the Interstate Commerce Commission; that amount was due and owing and must have been paid regardless of the good faith of the transaction. The shipper and carrier then had

their contractual relations fixed, which, under the law governing this case, they could not change by agreement at that time, nor could they subsequently agree upon a different amount.

There is no doubt that in many cases the interstate commerce law works injustice, but Congress by the Constitution is given power to pass laws for the general welfare of the country, and in its wisdom it has seen fit to enact this law; it is to the general welfare and not to the particular welfare of individuals that courts must look and see that the law is strictly enforced, and especially is this true where by an act of omission or commission parties have transgressed the law. In this particular case I feel certain that it works a hardship on the respondent, but to allow the respondent to escape the payment the law has fixed would be against the general welfare and render ineffectual a measure designed for its benefit. Fortunately, where such particular cases work hardships on the individual, there is an arbiter to which he may go for redress; and from the very nature of the law and the exigencies of the case and for the keeping of rates fixed and certain, that arbiter must necessarily be the Interstate Commerce Commission; that is his way, and it is the only way open for redress; he may there have his day in court, press the merits of his demand and thus not be denied a hearing and an adjudication of his rights.

127 It is my opinion that the trial court erred in directing a verdict for the respondent and that the judgment should be reversed and the cause remanded for trial in conformity with the views herein expressed. I therefore dissent from the result reached by a majority of the court.

JOHN S. FARRINGTON, *Judge.*

128 STATE OF MISSOURI:

I, George H. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the statement and dissenting opinion of Farrington, J., in the above entitled cause, as fully as the same remains on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals.

Done at office in Springfield, State aforesaid, this third day of March 1913.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL, *Clerk.*

129 [Endorsed:] 16038. No. 910. St. L. S. W. Ry. Co. App. vs. Spring River Stone Co., Resp. Dissenting Opinion of Judge Farrington. Opinion of the Court, By Jno. S. Farrington, Judge. Filed March 3, 1913. George H. Daniel, Clerk. Filed Mar. 18, 1913. Della A. Sharp, Clerk.

130 [Endorsed:] #910. St. Louis & Southwestern Railway Co. of Texas, Pl'ff in Error, vs. Spring River Stone Co., Def. in error. Copies of records from Springfield Court of Appeals, State of Missouri.

131 In the Springfield Court of Appeals of the State of Missouri, October Term, 1912, January Call, 1913.

No. 910.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Appellant,
vs.
SPRING RIVER STONE COMPANY, Respondent.

*Petition for Writ of Error.*

Assignment of Errors.

Considering itself aggrieved by the final decision of the Springfield Court of Appeals in rendering judgment against it in the above entitled cause, the appellant in this Court, and plaintiff below, hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States, and the said St. Louis Southwestern Railway Company of Texas assigns the following errors in the record and proceedings in the said cause:

First. The Springfield Court of Appeals erred in holding that appellant was not entitled to recover the balance of freight charges due on interstate shipments from Carthage, Missouri, to Ft. Worth, Texas.

Second. The Springfield Court of Appeals erred in holding that the minimum weight should be the capacity of the car ordered by the shipper, even though such order was not noted on the bill of lading as required by schedules duly published and filed with the Interstate Commerce Commission according to the acts of Congress regulating commerce.

132 Third. The Springfield Court of Appeals erred in refusing to hold that the lower court, in which said cause was tried, erred in giving to the jury a peremptory instruction to find for the defendant, and in approving and affirming the ruling and decision of the lower court in giving said instruction to the jury at the trial of said cause.

Fourth. The Springfield Court of Appeals erred in affirming the judgment of the Jasper County Circuit Court in said cause, in that the decision was against a title right and privilege claimed by appellant under a statute of the United States, said statute being the Act of Congress, approved February 4, 1887 and acts amendatory thereof, and supplementary thereto, being the Acts to Regulate Commerce, more especially Section 6 of said act which said title, right and privilege were specially set up and claimed by appellant.

Fifth. The Springfield Court of Appeals erred by refusing to enforce provisions of schedule duly filed with the Interstate Commerce Commission, published according to the Acts of Congress to regulate commerce and in effect at the time the shipments were made, said provisions not having been held unreasonable or otherwise in violation of the Acts to Regulate Commerce by the Interstate Commerce Commission.

Sixth. The Springfield Court of Appeals erred in refusing to reverse the judgment of the Circuit Court of Jasper County.

Wherefore, for these and other manifest errors appearing in the record, the St. Louis Southwestern Railway Company of Texas prays that the said judgment and decision of the Springfield Court of Appeals, dated March 3rd, 1913, be reversed, set aside and held for naught, and that judgment be rendered in favor of said St.
133 Louis Southwestern Railway Company of Texas, the plaintiff below, granting its rights under the Constitution and laws of the United States, and said appellant also prays for judgment for its costs.

S. H. WEST,
COLLINS, BARKER AND BRITTON,
*Attorneys for Petitioner.*

In the Springfield Court of Appeals.

Let the writ of error issue upon the execution of a bond by the St. Louis Southwestern Railway Company of Texas to the Spring River Stone Company in the sum of Five Hundred (500) Dollars. When such bond is approved, it shall act as a supersedeas.

Dated this 29th day of March, 1913.

W. R. ROBERTSON,
*Presiding Judge of the Springfield Court of Appeals of the State of Missouri.*

Filed Mar. 31, '13. George H. Daniel, Clerk.

STATE OF MISSOURI:

In the Springfield Court of Appeals.

The original of the foregoing writ of error was lodged with the Clerk of the Springfield Court of Appeals on March 31st, 1913, and also at the same time and place, a copy thereof for Spring River Stone Company. The following endorsement was made upon said original writ and copy: "Filed March 31 1913. George H. Daniel." Clerk, Springfield Court of Appeals.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
*Clerk of the Springfield Court of Appeals, State of Missouri.*

(Copy.)

134 ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff in Error,
vs.
SPRING RIVER STONE COMPANY, Defendant in Error.

*Bond.*

Know all men by these presents that we, the St. Louis Southwestern Railway Company of Texas, as principal, and Edgar P. Mann & J. L. Hine, as sureties, are held and firmly bound unto the Spring River Stone Company in the sum of Five hundred and no/100 Dollars, to be paid to the said obligee, its successors and assigns, and the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Dated this 28th day of March, 1913.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court, to reverse the judgment rendered in the above entitled action by the Springfield Court of Appeals.

Now, therefore, the condition is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.
(Signed) By ROY F. BRITTON, *Att'y.*
EDGAR P. MANN.
J. L. HINE.

(Endorsed:) Approved Mar. 29, 1913. W. R. Robertson, Presiding Judge.

135 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Springfield Court of Appeals of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Springfield Court of Appeals of the State of Missouri, before you, or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between the St. Louis Southwestern Railway Company of Texas, a corporation, appellant, and the Spring River Stone Company, a corporation, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exer-

cised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of or an authority exercised under said statute, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of said St. Louis Southwestern Railway Company of Texas, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same in said Supreme Court at Washington within thirty days from the date hereof, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice
136 of the United States this the 29th day of March, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal of the United States District Court, Southern Division of the Western Judicial District of Missouri.]

JOHN B. WARNER,
*Clerk of the United States District Court, Western Judicial District of Missouri, Southern Division.*
By GEORGE PEPPERDIM,
*Deputy.*

Allowed by:
W. R. ROBERTSON,
*Presiding Judge of the Springfield Court of Appeals of the State of Missouri.*

Filed Mar. 31, '13. George H. Daniel, Clerk.

137 *Citation.*

The President of the United States to the Spring River Stone Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Springfield Court of Appeals of the State of Missouri, wherein the St. Louis Southwestern Railway

Company of Texas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the presiding Judge of the Springfield Court of Appeals of the State of Missouri this 29th day of March, 1913.

W. R. ROBERTSON,
*Presiding Judge, Springfield Court of Appeals, State of Missouri.*

CARTHAGE, MISSOURI, *March 29th*, 1913.

We, attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter our appearance in the Supreme Court of the United States.

THOMAS & HACKNEY,
*Attorneys for the Spring River Stone Company.*

Filed Mar. 31, '13. George H. Daniel, Clerk.

138 STATE OF MISSOURI:

In the Springfield Court of Appeals.

The original of the foregoing writ of error, with the copy thereof for said Spring River Stone Company, original of the foregoing bond, assignment of errors and prayer for reversal and petition for writ of error, were each lodged with the Clerk of the Springfield Court of Appeals of the State of Missouri, on March 31 1913, and each marked "filed March 31 1913."

Witness my hand and seal of said court.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
*Clerk of the Springfield Court of Appeals, State of Missouri.*

139 [Endorsed:] St. Louis & Southwestern Railway Co. of Texas, pl'ff in error, vs. Spring River Stone Co., Def't in error. Petition for writ of error to Supreme Court of the United States. Filed Mar. 31, '13. George H. Daniel, Clerk.

Endorsed on cover: File No. 23,658. Missouri, Springfield Court of Appeals. Term No. 530. St. Louis Southwestern Railway Company, plaintiff in error, vs. Spring River Stone Company. Filed April 26th, 1913. File No. 23,658.

No. 125.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1916.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

SPRING RIVER STONE COMPANY.

IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

## BRIEF FOR PLAINTIFF IN ERROR


S. H. West,
E. A. Haid,
C. C. Collins,
H. C. Barker,
Roy F. Britton,
*Attorneys for Plaintiff in Error.*



Buxton Printing Co. of St. Louis.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 158.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*,

*vs.*

SPRING RIVER STONE COMPANY.

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## STATEMENT OF THE CASE.

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On December 1st, 4th, 5th, 19th and 30th, 1908, Defendant in error shipped certain carloads of stone—one carload each day—from Carthage, Mo., to J. B. Hoffman, at Ft. Worth, Texas, shipments moving over the line of the St. Louis & San Francisco Railroad to Jonesboro, Arkansas, from thence over the St. Louis Southwestern Railway to Texarkana, Texas and from thence over the St Louis South-

western Railway Company of Texas to Ft. Worth, Texas. After the freight charges, amounting to $1,014.48, claimed by the Railroad Company to be due, had been paid, Defendant in error made a claim for an overcharge, which was settled by the Railroad Company paying the Defendant in error the sum of $270.60. It is alleged in the petition that the original amount collected was an error, and that the correct amount according to rates duly published and filed with the Interstate Commerce Commission as required by law, is $1067.00. The Railroad Company demanded the return of the money paid by mistake, and the balance necessary to make up the correct amount of charges, which demand was refused, and this action was then begun in the Circuit Court of Jasper County, Mo., to collect the sum of $323.12.

The Act of Congress to Regulate Commerce, requires (Section 6), that common carriers shall publish their rates in schedules or tariffs to be filed with the Interstate Commerce Commission, and

copies thereof to be kept posted in the depots and stations, and it further provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device, any portion of the rates, fares and charges so specified."

The rates governing shipments of stone from Carthage, Mo., to Ft. Worth, Texas, are published and filed with the Interstate Commerce Commission, as required by law, and copies of said tariffs, duly certified by the Secretary of the Interstate Commerce Commission, were introduced in evidence at the trial. (Transcript p. 8, 9, 10.)

Item 202 of Texas Tariff No. 42-B, effective August 10, 1908, and in effect at the time the shipments moved, is as follows:

STONE.

202 Building (not Granite or Marble), Flagging and Paving, rough quarried, sawed or dressed, including Artificial Moulded Stone not polished, lettered or figured), minimum weight 50,000 pounds, from Kansas City Territory (see Item No. 1), to points taking Ft. Worth-Dallas Group rates (see Item No. 3), 27½ cents per 100 pounds.

(See Item Nos. 54 and 417.)

Item No. 1, referred to above is as follows:

For alphabetical list of points located in the following territories see Texas Territorial Directory Series 1 (I. C. C. No. 496) and supplements thereto or reissues thereof:

| | |
|---|---|
| Kansas City Territory. | Kansas Group No. 1. |
| Kansas Group No. 2. | Kansas Group No. 3. |

A certified extract from the Territorial Directory No. 1, I. C. C. No. 496, was also introduced in evidence, and shows that Carthage, Missouri, is located in the "Kansas City Territory."

Item No. 3 referred to gives a list of points taking Ft. Worth-Dallas group rates and includes Ft. Worth on the St. Louis Southwestern Railway Company of Texas.

Item No. 54 of the Texas Tariff No. 42-B provides:

54 Stone. St. Louis & San Francisco Railroad. (See Item No. 202.) Minimum weight will be the marked capacity of car on Stone, between points on St. Louis & San Francisco R. R.; also on shipments originating at points on that line destined to points on its connections.

Item No. 81 under the head of "Rules" in Texas Tariff No. 42-B is as follows:

| | |
|---|---|
| 81<br><br>Minimum Weight Assessed, based on Capacity of Car Shipper may order. | The following rule will be observed in assessing the freight charges for minimum weights, according to capacity of car. "When carrier cannot furnish car of capacity ordered by shipper, and for his own convenience provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum carload weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight. Capacity of car ordered; number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's way-bill." In no case must shipment be billed at minimum weight of a car of less capacity than in service on initial line. |

The charges were originally assessed on the theory that a minimum weight of 50,000 pounds should be applied, but the later demand was based on the provision that the minimum weight from points on the St. Louis & San Francisco Railroad to points on its connections should be the marked capacity of the car, which provision, it will be observed from the foregoing, had not been canceled. The evidence offered at the trial proved that the marked capacity of the cars used in these shipments, was as follows:

M. & N. A. No. 1110, 88,000 pounds; St. L. & S. F. No. 93997, 80,000 pounds; St. L. & S. F. No. 94134, 80,000 pounds; L. & N. No. 25096, 80,000 pounds; C. of Ga. No. 9193, 60,000 pounds. (Transcript p. 33, 39.)

Plaintiff also offered in evidence. the shipping receipts signed by the agent of the Railway Company when these shipments were delivered to it at Carthage, Missouri, Exhibits C., D., E., F. and G. (transcript ps. 30 to 32), and none of these, which were the only receipts, or bills of lading issued by

the Railway Company for these particular shipments (transcript pages 42 and 43), contained a notice of the capacity of the car ordered and the number and date of the order as required by Item 81.

At the conclusion of plaintiff's evidence, the Court instructed the Jury to find for the defendant, and after an unsuccessful motion for a new trial, plaintiff appealed to the Springfield (Missouri) Court of Appeals. That Court affirmed the judgment of the trial Court, each of the judges writing a separate opinion, two of them holding that the judgment should be affirmed, each one for reasons in which the other did not concur (transcript 67 to 73) and the third dissented from the opinion of the other two, (transcript 74 to 83). 169 Mo. App., 109.

## SPECIFICATION OF ERRORS.

*First:* The Springfield Court of Appeals erred in holding that plaintiff in error was not entitled to recover the balance of freight charges due on interstate shipments from Carthage, Missouri, to Fort Worth, Texas, according to tariffs duly published and filed with the Interstate Commerce Commission, in accordance with the Act to Regulate Commerce.

*Second:* The Springfield Court of Appeals erred in holding that the minimum weight to be applied on the shipments in question was the marked capacity of the car *ordered by the shipper*, even though such order was *not* noted on the bill-of-lading, as required by Item 81, Texas Tariff No. 42-B in effect at the time the shipments moved and on file with the Interstate Commerce Commission, and in holding that this provision of the tariff was *only directory;* for the reason that the provision was a "regulation" affecting charges on an interstate shipments and was published and filed as required by Section 6 of the Act to Regu-

late Commerce and cannot be departed from by either carrier or shipper.

*Third:* The Springfield Court of Appeals erred in refusing to hold that the lower Court erred in giving to the jury a peremptory instruction to find for the defendant on the testimony offered by the plaintiff and in approving and affirming the ruling and decision of the trial Court in giving said instruction; for the reason that the Court, by such action, permitted shipments in interstate commerce to move on the payment of charges *less* than those specified in schedules of rates duly published and filed with the Interstate Commerce Commission.

*Fourth:* The Springfield Court of Appeals erred in holding that a shipper and a carrier engaged in interstate commerce may, between themselves, settle their respective civil liabilities with reference to charges on interstate shipments, by agreeing upon an amount less than the rates published and filed with the Interstate Commerce Commission, even though the Supreme Court of Missouri has so held

similar cases affecting transactions of public officers; for the reason that the Constitution of the United States, Article VI., Section 1 provides that the laws of the United States "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary nothwithstanding."

## BRIEF.

### (1)

Common carriers by railroad engaged in interstate commerce are required by the Acts of Congress regulating commerce to collect the rates published in the schedules or tariffs on file with the Interstate Commerce Commission.

Act of Feby. 4, 1887, U. S. Comp. Stat. 1901, p. 3158; amended by Act of June 29, 1906, U. S. Comp. Stat. Sup. 1909, p. 1153, as amended by the Act of June 18, 1910, U. S. Comp. Stat. Sup. 1911, p. 1284;

G. C. & S. F. Ry. vs. Hefley (1895) 158 U. S. 98.

T. & P. vs. Mugg (1906), 202 U. S. 242.

Armour Packing Co. vs. U. S. (1908), 209 U. S. 56.

T. & P. vs. Abilene Cotton Oil Co. (1907), 204 U. S. 426.

T. & P. vs. Cisco Oil Mill Co. (1907), 204 U. S. 449.

Albers Commission Co. vs. K. C. So. Ry. (1912), 223 U. S. 573.

Robinson v. B. & O. R. Co. (1912) 222 U. S. 506.

Illinois Central v. Henderson Elevator Co. (1913), 226 U. S. 441.

Poor & Grain Co. vs. C. B. & Q. R. R. (1907). 12, ?, I. C. C. Rep., 418.

Blinn n vs. Southern Pac. (1910), 18 I. C. C. Rep. 430.

Gerber vs. Wabash Ry. (1895), 63 Mo. App. 145,

Sutton n v. St. L. S. F. R. R. (1911) 159, Mo. App., 685.5.

Dunne & Grace vs. St. L. S. W. Ry. (1912), 166 Mo. App. 372.

(2)

Shippers are presumed to know the provisions of tariffs duly published and filed with the Interstate Commerce Commission, and rates named in such tariffs are not the subject of contract between carriers and shippers.

C. & A. vs. Kirby (1912), 225 U. S. 155.

Adams Ex. Co. v. Croninger (1913) 226 U. S., 491.

M. K. & T. Ry. v. Harriman (1913), 227 U. S., 656.

B. & M. Ry. v. Hooker, (1914), 233 U. S. 97.

B. & O. vs. New Albany B. & B. Co. (1911), 94 N. E. Rep. 906.

Mires vs. Railroad (1908) 134 Mo. App. 379.

Drey & Kahn v. M. P. R. R. (1911) 156 Mo. App. 178.

U. S. v. Miller (1912) 223 U. S. 599.

(3)

The shipping ticket prepared by Respondent's employee and signed by Appellant's agent is a "bill-of-lading." A bill of lading is the carrier's receipt for goods delivered to it for transportation. It may also contain the contract of carriage, but this is not necessary to make the instrument a bill-of-lading.

Porter on Bills-of Lading;

Standard Dictionary.

Webster's New International Dictionary.

Century Dictionary.

Cope vs. Cordova, 2 Rawle (Pa.), 202.

The Mayflower 16 Fed. Cases, 1250.

Hutchinson on Carriers.

(4)

The provision of the tariffs requiring that the shipper's order for cars of certain capacity be noted on the bill of lading to authorize the use of the marked capacity of the cars so ordered as the minimum weight

on the shipments, is a "regulation affecting the charges" within the meaning of Section 6 of the Act to Regulate Commerce; such regulations are a part of the contract of shipment which automatically determine the rates to be charged and must be complied with by both shipper and carrier.

B. & M. Ry. v. Hooker (1914) 233 U. S., 97.

C. R. I. & P. vs. Cramer (1914) 232 U. S., 490.

M. K. & T. vs. Harriman (1913) 227 U. S., 656.

## ARGUMENT.

This was an action to recover the balance of freight charges due according to schedule of rates or tariffs filed with the Interstate Commerce Commission on interstate shipments moving from Carthage, Missouri, to Fort Worth, Texas. At the close of plaintiffs testimony the trial Court peremptorily instructed the jury to return a verdict for the defendant. The case was appealed to the Springfield Court of Appeals, where the judgment of the trial Court was affirmed.

According to the testimony offered by plaintiff, the defendant tendered to the St. Louis & San Francisco Railroad at Carthage, Missouri, several carloads of stone. At the time the shipments were made the Stone Company, defendant in error, gave to the agent of the railroad company, shipping tickets prepared by the Stone Company's employes which contained a description of the shipments, the name of the consignee and the destination but

did not state that cars of a certain kind had been ordered; an employe of the Stone Company testified that he gave someone at the Railway Company's office, notice that he wanted five, fifty thousand pound cars. The tariff in effect at the time fixed the minimum weight on such shipments at *the marked capacity* of the car; and another regulation of the tariff requires that when the carrier cannot furnish a car of the capacity ordered, by the shipper, and for its own convenience provides a car of greater capacity than the one ordered, such car may be used on the basis of the minimum weight fixed in the tariff applied on size of car ordered by shipper provided the *number of the order and date of the same and capacity of car ordered be shown in each instance on the bill-of-lading and the carrier's way-bill.*" The cars used in transporting the stone were of 60,000, 80,000 and 88,000 pounds capacity and the balance of freight charges sought to be recovered in this case is based on the capacity of the cars *furnished*,

and not on the capacity of the cars which the shipper *claims he ordered.*

The defendant contends that as its employee gave a verbal order to the Railroad agent for cars of 50,000 lb. capacity the charges should be based on the capacity of the cars *ordered* and not on the capacity of the cars *used* even though the information required by the tariff was not noted on the bills-of-lading.

The principal question in the case then is: May a regulation affecting an interstate rate published in a carriers tariff be disregarded; is the regulation merely directory or must it be strictly complied with according to its terms by both shipper and carrier?

It is difficult to determine on what grounds the Springfield Court of Appeals based its decision. The two judges, who wrote opinions affirming the judgment of the lower court, gave separate and distinct reasons, neither concurring in the reasons of the other, and the third judge dissented from the opinions of the other two. We discuss these opinions separately.

I.

Judge Robertson's opinion may be disposed of briefly. He holds that the settlement made by the Commercial Agent of the Railroad Company and the shipper was binding on both parties, even though it resulted in the payment of freight charges amounting to less than would have been due had the charges been calculated on the correct tariff rate. It is conceded that this settlement was made in good faith, and that there was no intention on the part of either party to violate the law. Judge Robertson cites decisions of the Missouri Supreme Court, which hold that a settlement by a Public Officer, made under a mistake of fact, is binding, and then the Judge says: "While it may be true, as contended by plaintiff, that the parties to this litigation could not have entered into a binding agreement for a different rate from that fixed by the rules, tariffs, etc., under the Act of Congress, nevertheless they have settled, as between themselves, their respective civil liabilities on account of the shipments, and it

is as essential in this case as in the cases where Public Officers received more than they were entitled to by law, that the right of controversy between the parties be foreclosed by their settlement; and it is our duty to follow the decisions of the Supreme Court." (Transcript p. 69.)

The Court was not considering a State law, but was passing upon a Federal law, which had been construed by the Supreme Court of the United States.

G. C. & S. F. Ry. vs. Hefley, 158, U. S. 98.
T. & P. vs. Mugg, 202 U. S., 242.
Armour Packing Co. vs. United States, 209 U. S., 56.
Albers Com. Co. vs. K. C. S. Ry. Co., 223 U. S., 573.
Robinson vs. B. & O. Ry., 222 U. S., 506.

These, and other decisions, hold that the rates published in the schedules of the carriers are binding upon both parties, and cannot be departed from either by naming a different rate in the bill-of-lading, by agreement of the parties, or by any other means,

and the reason for the rule precludes a valid settlement between carrier and shipper, which has the effect of giving the latter a reduced rate. As said by Mr. Commissioner Harlan, in Poor Grain Company vs. C. B. & Q. Railroad, 12 I. C. C. Rep. 418, "past experience shows that billing clerks and other agents of carriers might easily become *experts in the making of errors and mistakes in the quotation of rates to favored shippers*, while other shippers, less fortunate in their relations with carriers, and whose traffic is less important, would be compelled to pay the higher published rates, * * * * * * *. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law."

Nor is it material that both parties acted in good faith. In B. & O. Railroad vs. New Albany B. & B. Co., 94 N. E. Rep. 906, in considering this question, the Indiana Appellate Court said:

> "Good faith would doubtless save the parties from the charge of criminal intent, at least up to the time when the truth became known, and

> the loss suffered by the Appellee cannot affect or change the rule of law. The rate given to the Appellee was an unlawful rate, and can neither bind the Company making it nor protect the shipper receiving its benefits."

The decisions of this Court above cited hold that the integrity of the Interstate Commerce law can only be preserved by strict adherence to the published tariffs, and the decisions of the Missouri Supreme Court, relating to the settlements by public officers can in no way affect this principle. The learned judge must have overlooked Article 6 of the Constitution of the United States, which provides that "this Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

II.

Judge Sturgis, in his opinion, concedes the binding effect of published rates, but holds that in this case,

the Railroad Company exacted more than the established rate filed with the Interstate Commerce Commission, for the reason that the shipper gave *a verbal order for cars of fifty thousand pounds capacity*, and, under the tariff rule, the marked capacity of the cars ordered should be used as a basis for assessing the rate. The schedule of rates in effect at the time the shipments moved, provides that the minimum weight will be the marked capacity of the car, and Item No. 81, under the head of "Rules" in the tariff provides: "When carrier cannot furnish car of capacity ordered by shipper, and for his own convenience provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum carload weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight. *Capacity of car ordered, number of the order, and date of the same to be shown in each instance on the bill-of-lading and the carrier's way-bill.*" The shipments, in the case at bar, were made on shipping tickets or

receipts, prepared on the shipper's own forms by one of its employes, and signed by the Railroad Agent (See Exhibits "C", "D", "E", "F" and "G" transcript pages 30-32.)

Judge Sturgis holds that the provision of the tariff which we have italicized in the above quotation is for the benefit of the carrier, and, like the provision of the law requiring rate schedules to be posted, is "directory rather than a condition precedent, and is to be done to afford a ready means of checking up the transaction of such carriers."

By "checking up", we presume the learned judge means that supervision of the carrier's transactions by the Interstate Commerce Commission, and, in this we think he is correct, but, in passing, we ask, of what *value, for this purpose*, is the provision if it is *not to be enforced?* For instance, a shipper may neglect to order a car of certain size, and, after the transportation is completed, by collusion with employes of the railroad or on his own statement, may be able to show that he gave a verbal order for

cars, which, through the negligence of the carrier's agent, was not noted on the bill-of-lading, and he thereby secures the benefit of a lower rate to which he is not entitled, and the Interstate Commerce Commission and the Courts would be powerless to relieve the situation. Judge Sturgis' construction of the law would leave to the jury in each case the determination of the question of fact as to whether or not the shipper did order smaller cars than were furnished wholly disregarding the plain method of proving this fact provided in the tariff. This procedure would necessarily result in that inequality which the law seeks to prevent. The doctrine of chance should have no place in a law designed and intended to secure equal treatment to all by a public utility. The only way that supervision by the commission can be made effective is to enforce a strict compliance with the safeguard provided in the tariff for verifying the shipper's statement.

It is well settled by many decisions of this Court that an interstate rate published in schedules filed

with the Interstate Commerce Commission must be strictly adhered to by the carrier and shipper, and cannot be changed or departed from by the act of either or the agreement or both; the rate remains in force unless changed by order of the Interstate Commerce Commission or by publication and filing of another rate, as required by law.

Section 6 of the Act to Regulate Commerce provides that the schedules filed with the Interstate Commerce Commission shall contain, not only the rates of freight, but, also, "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper, or consignee." Any "regulation" which affects the rate is a necessary part of the rate and must be strictly enforced. The rule involved in the case at bar provided that when the shipper orders a car of a particular size and the carrier furnishes one of greater capacity, the minimum weight of the car ordered shall govern, "the

capacity of the car ordered, number of the order and date of the same to be shown in each instance, on the bill-of-lading and the carrier's way-bill." An employe of the shipper testified that he gave a verbal order for cars of fifty thousand pounds capacity, but this does not appear on the bill-of-lading, although the bill-of-lading was prepared by the shipper himself. Is this provision of the schedule, a "regulation" within the meaning of Section 6 of the Act to Regulate Commerce?

In Boston and Maine Railroad vs. Hooker, 233 U. S., 7, this Court had under consideration a provision of an interstate passenger rate schedule limiting the carrier's liability for personal baggage to not to exceed One Hundred Dollars. In holding that this was a regulation within the meaning of the Act Mr. Justice Day, speaking for the Court, said:

> "It is a regulation which fixes and determines the amount to be charged for the carriage in view of responsibility assumed, and it also affects the value of the service rendered to the

passenger. Such requirements are spoken of, in decisions dealing with them, as regulations, as, 'a common carrier may prescribe regulations to protect himself against imposition and fraud and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter.' "

York Mfg. Co., vs. I. C. R. R. Co. 3, Wall. 107. * * *

Mr. Justice Day points out that the Interstate Commerce Commission in its Tariff Circular 15-A, required the publication of general baggage regulations and then says:

"This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge and is entitled to weight in construing the Act."

The regulation in question in this case appears as Administrative Rule No. 66 of the Interstate Commerce Commission's Tariff Circular 18-A as follows:

(Adopted December 7, 1909).

"The Commission believes it to be the duty of every carrier to incorporate in its tariff

regulations a rule to the effect that when carrier cannot promptly furnish car of capacity or dimensions desired by the shipper, and for its own convenience does provide a car of greater capacity or dimensions than that ordered, such car may be used on the basis of the minimum carload fixed in the tariffs for cars of the dimensions or capacity ordered by the shipper *provided the shipment could have been loaded into or upon car of the capacity or size ordered;* and that if a car of smaller capacity than that ordered by the shipper is furnished, it may be used on the basis of actual weight when loaded to its full visible capacity, or that that portion of the shipment which cannot be loaded into the smaller car will be taken into another car and the shipment treated as a whole on the basis of the minimum fixed for the car ordered by the shipper; and that if the carrier is unable to furnish a car of large dimensions, ordered by shipper, it may furnish two smaller cars which may be used on the basis of the minimum fixed for the car ordered; it being understood that shipper may not order a car of dimensions or capacity for which a minimum is not provided in the carrier's tariffs.

*In all such cases the capacity of the car ordered, the date of such order, the number, initials and*

*capacity of the car furnished should be stated on the bill of lading and the carrier's waybill."*

In this Rule, the Commission further says:

("Adopted May 12, 1908). The minimum weight upon which carload rate is based is a part of the rate, because the charges on the shipment are determined by such minimum weight. The publication, posting, and filing of the rate and of the minimum weight, are therefore equally necessary, and it is also equally necessary that both be observed."

Thus it appears that the Interstate Commerce Commission prescribed the regulation and was cautious in requiring proper safeguards.

In the Hooker case, in speaking of a limitation of the carrier's liability as published in the tariff, Mr. Justice Day further said:

"Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she (the passenger) might have declared the value of her luggage, paid the excess tariff rate, and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the

purpose of transportation, have valued it at $100.00, and received free transportation and liability to that extent, only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

And, in

M. K. & T. vs. Harriman Bros., 227 U. S., 656; the Court says:—

"When a carrier graduates its rates by value, and has filed its tariffs showing two rates applicable to a praticular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation *automatically determines which of the rates is the lawful rate.*"

And so, in

C. R. I. & P. vs. Cramer, 232 U. S., 490;

in speaking of rates based on valuation specified in a schedule, Mr. Justice Lamar said:

"That rule of liability is to be enforced in the light of the fact that the *provisions of the tariff enter into and form a part of the contract of shipment*, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded

> at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

Thus the shipper is charged by law, with a knowledge of the rates and the tariff provisions affecting them and if any affirmative act of the shipper is necessary in order to determine the amount of the charge, the neglect or failure to do such an act *automatically* fixes the rate to be charged and so, in the case at bar, the shipper was charged with knowledge of the traiff provisions which made the notation of certain information on the bill-of-lading a condition precedent to the application of the marked capacity of the cars, which he claims to have ordered, as the minimum weight, and even though the bills-of-lading were prepared by the shipper, himself, the information to secure the benefit of the rate for which he contends, was not supplied.

This Court having held that rules limiting the liability of the carrier to certain declared values in

freight shipments or to certain specified amounts with respect to a passenger's baggage, are *regulations* within the meaning of Section 6 of the Act to Regulate Commerce, because they affect the amount of the charge, it would seem to necessarily follow that rules, specifying what shall be done in order to secure the application of certain minimum carload weights, are regulations within the meaning of the law. The weight of the shipment is one of two factors used in determining the amount of the freight charges and the minimum carload weight can be determined, only, by the tariff rule. The tariff, as required by the Commission, having provided that the minimum weight should be the marked capacity of the car and further, having properly provided that if a fictitious minimum weight is to be used such as the marked capacity of the car ordered by the shipper, the bill-of-lading must disclose the shipper's order for cars of the capacity used for this purpose. In no other way could the carrier be protected against fraud and imposition and in no other

way could other shippers be protected against discrimination. It is only by holding all alike to the hard and fast rules of strict and unvarying compliance that every regulation of the tariff, that the integrity of the Act to Regulate Commerce can be fully preserved and its cardinal purpose of equality to all, carried out.

Judge Sturgis in his opinion says that this provision is only "directory" like that section of the law relating to the posting of tariffs. There is an obvious distinction between the result of a failure to post and a failure to comply with the tariff rule; the former does not, and could not, in any way, affect the established rate, while the latter necessarily determines the amount of the charge. This Court, in several cases, has held that the rates are *established* by the act of publishing the schedules and filing them with the Interstate Commerce Commission and when that is done notice is thereby given to all the world of the rates and rules affecting them and, neither the failure to post the schedules at any

particular station or any other act of the carrier or shipper will warrant a departure from rates so established.

In United States vs. Miller 223, U. S. 599, Mr. Justice Vandeventer says:

> "In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates—a result which evidently is not intended by the Act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed."

Thus it will be seen that the reasons for the rule respecting posting do not apply to regulations published in a tariff. When once established, these regulations like the rates themselves, are as fixed unalterable as though established by Congress and it should not be left to the carrier and shipper to

pick and choose the portions of the regulations that will be complied with and those that will not be complied with. If the regulations are unnecessary or unreasonable, the shipper has his remedy in a complaint to the Interstate Commerce Commission which body has authority to modify or abolish such rules, but so long as they are not attacked in the method prescribed by law, they must be applied to all shippers alike.

In the case at bar, it was peculiarly within the power of the shipper to see that the rule was strictly complied with, because the bills-of-lading were prepared by its employe and if fifty thousand pound cars had been ordered, being charged with a knowledge of the tariff provision, the shipper should have noted this order on the bill-of-lading. Furthermore, as we have pointed out, the regulation was, in fact, suggested and prescribed by the Interstate Commerce Commission in its administrative rules and as it refers to the number of the shipper's order and the date, it apparently was intended that such order

*should be in writing.* The testimony showed that whatever order, if any, was given orally, and it was not noted on the bills-of-lading.

III.

Judge Farrington dissented from the decision of the majority of the Court and we submit his opinion as a correct statement of the law. In the opinion he cites numerous cases of this and other courts, holding that interstate rates must be strictly enforced and argues that the bill-of-lading binds, not only the carrier, but the shipper as well and we commend the opinion of Judge Farrington to the consideration of this Court as being a sound and correct statement of the law of the case.

We respectfully submit that the decision of the Springfield Court of Appeals should be reversed.

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No. 158.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1914.

ST. LOUIS, SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

SPRING RIVER STONE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

## BRIEF OF DEFENDANT IN ERROR.

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of Kansas City, Mo.,
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IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

## STATEMENT OF DEFENDANT IN ERROR.

The statement of the plaintiff in error is incomplete in so many respects, that we will re-state the facts in this case.

While this suit is in form an action to recover freight charges it is in fact essentially an action to recover certain freight charges heretofore collected by the plaintiff

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rges collected on five car loads of stone,
m Carthage, Missouri, to Fort Worth, Texas,
t dates during the month of December, 1908.
making this refund the plaintiff in error de-
the defendant in error the return of this
ich, being refused, this action was instituted.
theory of the plaintiff in error as to the rate
o the shipments in question is correct, then
f collected the proper sum at the proper rate,
very of the shipment.
theory of the defendant in error as to the
is correct, then the carrier collected just two
nd seventy dollars and sixty cents ($270.60)
the actual amount of freight due. This was
t refunded by plaintiff to defendant.
stablished rate fixed by the tariff sheets on
the Interstate Commerce Commission, was
hundred weight, with a minimum capacity car
housand pounds; each car of stone, however,
ightly in excess of fifty thousand pounds, and
actually retained by the plaintiff after making
amounted to 27½c per hundred weight, on
net weight of each car after deducting dun-
takes.
lefendant has contended all along that it was
for the actual weight of the stone shipped.
ff now contends that the freight should be cal-
t on the actual weight of the stone but on the
pacity of each car.

This question turns on the proper construction of Item 81 of the rules in Texas tariff No. 42-B on file with the Interstate Commerce Commission and in force at the time the shipments in question were made, and introduced in evidence (see p. 9, Transcript). That rule provides:

> "When carrier cannot furnish car of capacity ordered by shipper, and for its own convenience, provides a car of greater capacity than the one ordered by shipper, it may be used on the basis of the minimum car load weight fixed in tariff, applied on size of car ordered by shipper, but in no case less than the actual weight. The capacity of the car ordered, the number of the order, and the date of same to be shown in each instance on the bill of lading, and the carrier's way-bill."

Under another rule it is provided that the rate on building stone (the material shipped in each car in question) from Carthage, Missouri, to Fort Worth, Texas, should be 27½c per cwt. minimum capacity of car fifty thousand pounds.

On the trial of this case, it clearly appeared from the evidence introduced by the plaintiff, that previous to making the shipments in question, the defendant had received a bid from J. B. Hoffman, of Forth Worth, Texas, for a quantity of building stone to be used in a certain structure, amounting to 5 car loads of fifty thousand pounds each, estimated by the ordinary weights applicable to this stone. The defendant made inquiry of the plaintiff's commercial agent for a rate, and was properly advised as to the correct rate on such stone. There-

upon the defendant accepted the bid of Hoffman for this stone delivered f. o. b. Forth Worth. Hoffman's yard in Texas was very limited in size, so that he could not handle the large cars of stone, and he requested that fifty thousand pound cars be sent him. The President of the defendant thereupon went to the agent of the carrier, at Carthage, Missouri, and notified him of the contemplated shipment of the five cars and explained that the defendant would need the fifty thousand pound cars. It was thereupon agreed by the agent for the carrier and the defendant's President that the defendant should call up the carrier's agent on the telephone from time to time as the cars were needed, and that these fifty thousand pound cars would be supplied in each case (See pp. 13, 15, Transcript).

Thereupon in each instance a car of fifty thousand pounds capacity was ordered over the telephone by the shipper of the carrier (pp. 21, 22, 33, Transcript).

It was admitted by the agent of the carrier, while testifying as a witness for the plaintiff (p. 25, Transcript) that at the time of the shipments in question the carrier was short of cars of fifty thousand pounds capacity, and when each fifty thousand pound car was ordered, the carrier for its own convenience furnished a car of greater capacity.

Whether the carrier marked on its bills of lading and way-bills the capacity of the car ordered, the number of the order and the date of same was *NOT* shown on the trial. The plaintiff who was the ultimate carrier, and

the natural custodian of the way-bills did not see fit to offer the way-bills in evidence, and made no effort to show whether there was or was not a notation on the way-bills of the capacity of the car ordered, the number of the order and date of same.

The plaintiff also failed to introduce in evidence the original or duplicate bills of lading. Some supposed copies of these bills of lading were offered in evidence, but were excluded by the trial court because they were not properly identified (p. 49, Transcript). These were copied into the record, and appear as Exhibits "S" to "W" inclusive, on pages 49 to 61 inclusive, of the transcript. There was no effort made by the plaintiff to introduce secondary evidence as to whether there was or was not any notation required by Item 81, placed on the original or duplicate bills of lading. The plaintiff, however, offered in evidence five shipping tickets, appearing in the record as Exhibits "C" to "G" inclusive (pages 30 to 32, Transcript). These shipping tickets are now seized upon and denominated by the plaintiff as the bills of lading. Neither of these tickets conforms to the Uniform Bill of Lading which had previously been adopted by the Interstate Commerce Commission, and in use by all interstate carriers. Stamped on the face of each of these shipping tickets is a receipt by the carrier's agent which expressly refers to the Company's Uniform Bill of Lading. Neither of these shipping tickets contained notation of the capacity of the car ordered, the number of the order, nor the date of the same.

It is the contention of the plaintiff that inasmuch as the carrier's agent failed to make this notation on the shipping tickets, that the shipper must pay a higher rate than what the tariff rule provided should have been charged, had the notation been made thereon, notwithstanding for aught appearing in this record the Uniform Bill of Lading and the carrier's way-bill may have contained the requisite notation.

When each shipment arrived at Fort Worth, the amount of the freight based on marked capacity of each car used was demanded by the carrier and paid by the defendant, in order to obtain prompt delivery of the stone, and within a few days afterward a claim was made against the plaintiff by the defendant for the overcharge (page 16, Transcript). As soon as this claim for overcharge was made, Mr. Marens, commercial agent of the plaintiff went to Carthage, Missouri, the point of shipment, and took a full statement from the shipper, examined the books and papers at the railroad office at the point of shipment, and, after a full investigation of all the facts, agreed with the defendant that there had been an overcharge of $270.60 (pages 18, 19, Transcript). Within a few days thereafter this amount was paid by plaintiff to defendant (page 12, Transcript).

It was admitted on the trial (page 18, Transcript) that in making this claim for overcharge and in allowing and paying the same, both parties acted in good faith, without intention to violate the law.

Notwithstanding the allowance of this claim and the payment of the money by plaintiff, it brought this suit to recover back the money thus paid.

The facts and circumstances attending the shipment, the ordering of the cars of fifty thousand pounds capacity, and the furnishing of a greater capacity car in each case, for the convenience of the carrier, together with the foregoing settlement were pleaded in bar to the action by the defendant.

At the close of plaintiff's evidence, the trial court held that the plaintiff was not entitled to recover and directed a verdict for the defendant.

On appeal to the Springfield Court of Appeals, the majority of the judges of the court held that the plaintiff could not recover. Robertson, presiding judge of that court, held that the settlement was binding on both parties, irrespective of the question of the construction of the paragraph in question, as to the notation on the bills of lading and way-bills.

Sturgis, Judge, in a concurring opinion held that the duty of making the notation on the bills of lading and the carrier's way-bills devolved upon the carrier, and that even though the carrier's agent neglected to make such notations, this would be a default of the carrier, which it could not take advantage of and make its neglect the basis or occasion of charging the shipper a higher rate than he would have been entitled to had the carrier's agent done his duty in making the notations.

The three judges of the Court of Appeals agreed on the proposition, and it was admitted on all hands throughout this case that the rates filed with the Inter-State Commerce Commission were binding upon shipper and carrier.

Farrington, Judge, dissented from the majority decision of the Court of Appeals and voted to reverse the judgment and remand the case, basing his contention on the proposition that while the rates and rules contained in the tariff sheets were binding, yet that the shipper could waive his rights to a lower rate and subject himself to a higher rate by accepting a bill of lading which through the carrier's fault did not contain the notation which should have been made on it. He treated the shipping tickets as the bills of lading, but made no suggestion as to the utter absence of proof as to what notations were or were not on the carrier's way-bills.

## POINTS AND AUTHORITIES.

I.

**Rate based on capacity of car ordered, not car furnished.**

Under Item 81 of the rules in Texas Tariff, No. 42-B, it is expressly provided that when the carrier cannot furnish a car of the capacity ordered by the shipper, and for his own convenience provides a car of greater capacity, than the one ordered, the charges should be assessed according to the capacity of the *CAR ORDERED* and *NOT THE CAR FURNISHED.*

The public were invited to move their merchandise on these terms. The carrier took upon itself the burden and it became its duty under the rule to protect the shipper in this rate by making the proper notations on its books and papers, showing the capacity of the car ordered, etc., in order that this lower rate might be applicable.

When, therefore, the defendant ordered from the carrier a car of a capacity within the limits of the rule, fifty thousand pounds, in the instant case, that constituted an acceptance of the carrier's offer and the right to the rate applicable to the car ordered then and thereby became fixed and binding on the carrier in favor of the shipper.

It was not within the right of the carrier after the lower rate had become thus fixed to neglect its duty and deprive the shipper of his rate. It was not a matter of waiver or contract thenceforth.

*Kaye & Carter Lumber Co.* v. *M. & I. Ry. Co.*, 16 I. C. C. 285, 287.
*General Chemical Co.* v. *Norfolk & W. Ry. Co.*, 15 I. C. C. 349.
*Noble* v. *B. & O. Ry. Co.*, 22 I. C. C. 432.

In *Kaye & Carter Lumber Company* v. *M. & I. Ry. Co., supra*, the Interstate Commerce Commission say:

> "A car load rate and a minimum weight for a car of definite dimensions when lawfully published in the tariffs of a carrier constitutes an open offer to the shipping public to move their merchandise on those terms; and it would be wholly unsound in principle to permit the carrier to impose additional transportation charges on the shipper who orders a car of a capacity, length or dimensions specified in any tariff simply because it is not provided with cars of the dimensions ordered."

In *Noble* v. *B. & O. Ry. Co., supra*, the Commission, after quoting from their previous decisions, say:

> "These decisions all proceed upon the theory that where a carrier by its tariffs specifies a certain minimum for a car of a certain size, it thereby tenders to the public that rate of transportation. HAVING TENDERED THE RATE IT MUST PROTECT THE PUBLIC IN ITS USE. To accord that rate to one shipper, while declining to give it or its equivalent to another would result in discrimination. * * * The complainant did everything in his power to secure the smaller car. A

larger car was furnished entirely for the convenience of the railway company. Upon what theory can the defendant charge up to the complainant the result of its own inability to furnish a facility tendered by its tariff?"

Where a shipper orders a car of the minimum capacity provided by the published tariff and the carrier furnishes one of greater capacity, the shipper does not by accepting and using the car furnished waive his right to have charges assessed on the marked capacity of the car actually ordered, and not the one furnished.

*General Chemical Co.* v. *Norfolk & W. Ry. Co.*, 15 I. C. C. 349.

II.

**Carrier's Duty to Make Required Notations.**

By the provisions of Item 81, of the rule in evidence, viz., "Capacity of car ordered, number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's way-bill," the carrier not only agreed to make this proper notation and to keep the proper record evidencing the shipper's request, and his right to the lower rate, but this became a matter of duty on the carrier imposed by law, from the performance of which it could not evade, shirk nor absolve itself by permitting or procuring the shipper to accept a bill of lading not containing the required notations thereon.

"A shipper cannot be deprived through a carrier's negligence of any lawful privilege offered by another carrier."

*Kile & Morgan Co.* v. *Deepwater Ry. Co.*, 15 I. C. C. 235, 238.

"No stipulation in a bill of lading can exempt a carrier from a duty imposed by law."

*R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 201.

Nor can a carrier by neglecting to issue a proper bill of lading exempt itself from a duty imposed by law.

If the shipper after having ordered the smaller car, within the limits of the tariff rules, and after having been furnished a car of greater capacity, for the carrier's convenience, can deprive himself of the legal right to the lower rate on the doctrine of waiver by accepting a bill of lading without the necessary notations thereon, then by parity of reasoning a shipper who had not ordered the smaller car, by tricking the carrier's agent into issuing a bill of lading falsely reciting that he had ordered a car of smaller capacity, and one of greater capacity had been furnished, could entitle himself to the lower rate and prevent the carrier from exercising its right to exact the rate properly applicable to the shipment, and thus the door of discrimination would be opened wide to carrier and shipper.

III.

**The carrier has no right to discriminate between shippers.**

The carrier owes the same duty of protecting the lower rate in favor of the ignorant and unsuspecting or careless shipper, as to the vigilant shipper.

If, by failing to make the proper notations on the bills of lading, and way-bills in question, the carrier in the case at bar could invoke the higher rate, and deprive the shipper of the lower rate, it would be nullifying the tariff rules which are intended to be a law unto the parties. It would put a premium on fraud, neglect of duty and sharp practice by the carrier.

IV.

**Carrier's duty to make proper notations a continuing one.**

Even though the proper notations required by the tariff rules were not on the bills of lading and carrier's way-bills, when originally issued, the duty on the carrier to make this duty: the proper notations was a continuing one, and the same could be performed by the carrier at any time it became necessary to protect the proper rate and justify the carrier in collecting the lower rate. Therefore, even though the notations were not made at the outset in the instant case, yet when the claim for overcharge was made by the shipper, and the carrier's agent made

the investigation, and was fully informed that the facts entitled the shipper to the lower rate, the carrier should then have made these proper notations, if they had not been made theretofore.

V.

**Burden of Proof on Plaintiff.**

(a) The burden was on the plaintiff on the trial of this case, to prove affirmatively that the bills of lading and carrier's way-bills did not contain the required notations, and by the failure of plaintiff to furnish the required proof, it debarred itself from recovery.

**Adverse Presumption from Withholding Evidence.**

(b) The plaintiff as the ultimate carrier is the proper custodian of the carrier's way-bills. The plaintiff likewise must be presumed to have had access to the original or duplicate Uniform Bills of Lading issued for each shipment. Having these documents in its control, and having failed to produce them, and offer them in evidence on the trial, the law raises the presumption that the evidence thus withheld by the plaintiff would disprove its contention and injure its case. 16 Cyc. 1059, 1060.

VI.

**Duty of Carrier to Return Overcharge.**

It was the duty of the plaintiff to return to the defendant the overcharge collected by it on the shipments

in question without resort to the Interstate Commerce Commission.

*Montgomery Freight Bureau* v. *W. Ry. of Ala.*, 15 I. C. C. 199, 204.
*Tyson & Jones Buggy Co.* v. *A. & A. Ry.*, 17 I. C. C. 330, 332.
*Edison Portland Cement Co.* v. *D. L. & W. RR. Co.*, 20 I. C. C. 95, 96.

In *Tyson & Jones Buggy Company* v. *A. & A. Ry. Co., supra*, the Commission say:

> "The retention by a carrier of an overcharge not only has all the effect of an unjust discrimination against the shipper from whom the excess has been demanded, but leaves the transportation transaction in an unlawful condition, both under the Act to Regulate Commerce and under the Elkins Act until the overcharge has been adjusted. * * * When the overcharge has been discovered it should immediately be repaid by the carrier who collected the charges, and this should be done whether a demand has been presented by the shipper or not."

VII.

**Settlement and Repayment Binding.**

The settlement between the carrier and the shipper having been made in good faith, and with full knowledge of the facts, and the overcharge having been refunded by the plaintiff to the defendant, the sum thus refunded cannot be recovered back by the plaintiff.

It affirmatively appeared from the evidence that the plaintiff's commercial agent after the claim for overcharge was presented, examined the books, papers and

records of th[e initial carrier at Carthage, Missouri, as
well as the records of defendant, and ascertained the
fact that the cars of fifty thousand pounds capacity had
been ordered and that the greater capacity cars had been
furnished for the convenience of the carrier. It must
be presumed that this agent saw what notations had been
made on the way bills, and the regular bills of lading.
At any rate, he was correctly informed of all of the facts.
It is clear that the defendant had the moral, if not the
legal right to the refund of the sum of money agreed
upon. The settlement and the payment thereof bound
the parties to it, and under no principle of law can the
plaintiff recover back the money thus paid.

8 Cyc. 517.

The basis of an action for a refund of money paid
is that the defendant has received money which *ex aequo
et bono* he ought to refund.

2 Ency. P. & P. 1016.

"It does not lie, however, for money paid by
the plaintiff which is claimed of him as payable
in point of honor and honesty, although it could
not have been recovered from him by any course
of law." 2nd Ency. P. & P. 1018, par. (b).

Where, as in this case, a settlement is made and with
full knowledge of all the facts, money is paid *even under
a mistake of law* it cannot be recovered back by the
party making the payment.

*Campbell* v. *Clark*, 44 Mo. App. 249.
*Cave ex rel. Scotland Co.* v. *Ewing*, 116 Mo.
*Sta* 129.
*Robin* v. *Adair County*, 171 Mo. 385.
*Cornicock* v. *Crawford Co.*, 200 Mo. 170, 172.
*Hekt Co.* v. *Bank*, 154 Mo. App. 89, 108.
*Tru*

## ARGUMENT.

We do not dispute the proposition that the rates published in the tariffs on file with the Interstate Commerce Commission are binding; nor do we dispute the proposition asserted by counsel for plaintiff in error that shippers are presumed to know the provisions of these tariffs, and that the rates named in such tariffs are not the subject matter of contract between carrier and shipper.

We have asserted throughout this case the binding force of these rates.

Counsel for plaintiff in error base their whole contention on the proposition that while the rates are binding on the shipper that the carrier is not equally bound. They disavow in terms, but in effect assert the proposition that the proper rate is a subject matter of contract between the carrier and the shipper. In other words, they contend that it is within the right of the carrier to induce the shipper to waive his right to the lawful published rates and to subject himself by this waiver to the application of the higher rate. They concede that the tariff rules placed the duty upon the carrier's agent to make the notations on the bills of lading and the carrier's way-bills. They concede that the facts in evidence justified these notations in the case at bar; yet forsooth, because of the neglect, ignorance, or design of

the carrier's agent, he failed to make these notations and induced the shipper to accept bills of lading without the notations thereon, thereby refraining from doing what the law expressly says he must do, he could thus entitle the carrier to exact the higher rate.

If such argument is sound, then the plaintiff has some show of reason for its claim in this case, but if the rules and regulations are binding on both parties alike then the question of what is the proper rate must be determined by the fact as to what was in truth the capacity of the car *ordered by the shipper*, and whether the carrier furnished for its own convenience, a car of *greater capacity*.

We contend, as has been well said by the Interstate Commerce Commission, that the published tariffs giving the right to a car of a certain minimum capacity, and to the rate applicable thereto, constituted an open offer to the shipping public to move their merchandise on these terms. That, when the shipper then ordered a car within the capacity provided by these rules, this constituted the acceptance contemplated by this tariff rule of the offer of the carrier, and that thereupon and thereby the right of the shipper to the lower rate became absolutely fixed and determined. That it was not within the power of the carrier by trick, artifice, or neglect of duty thereafter to deprive the shipper of this rate, and entitle the carrier to the higher rate.

If the shipper after having become entitled to the published rate on the car of the capacity ordered, can

deprive himself of the right to this rate on any doctrine of waiver, then the whole matter of determining the rate applicable to a shipment is within the domain of contract—a proposition repudiated from the very outset by every decision of this court, since the passage of the Act to regulate commerce, and providing for the filing of tariffs with the Interstate Commerce Commission.

It has been repeatedly held that if the carrier's agent, through mistake or inadvertence quotes the shipper a rate lower than the tariff rate, the shipper cannot claim the advantage, but must pay the rate fixed by the tariff. So on the other hand it must needs follow that if the carrier's agent in like manner quotes a higher rate than allowed by the tariff, and collects the money from the shipper, the carrier cannot claim the advantage, but must refund the excess over the lower rate. It not being within the power of the parties to change the lower rate by contract, it is likewise equally without their power to change the rate by neglect of either or both of the parties. THEY CANNOT ACCOMPLISH indirectly THROUGH WAIVER OR NEGLECT WHAT THEY COULD NOT ACCOMPLISH DIRECTLY BY THE TERMS OF AN EXPRESS CONTRACT.

It is just as much a violation of the law for the carrier to make an *overcharge* as it is to make an *undercharge*. If by neglect of performance of a plain duty enjoined upon it by law and the regulations of the published tariffs the carrier can exact from the shipper

more than it could lawfully exact in a case where its duty toward the shipper has been fully performed, then we certainly have the carrier reaping a premium on its own neglect. It is axiomatic that no one can build a title on his own default, nor base a claim to an advantage on his own wrong.

But it is contended by counsel for plaintiff in error that the shipper must see to it that the carrier does its duty in making the notations on its books and papers, and if through inadvertence or ignorance of the contents of the tariff rates the shipper suffers the carrier to issue an informal bill of lading without the proper notations thereon, he must be penalized and suffer all the loss.

Such contention would be well founded were it directed to a subject within the domain of contract where rights may be based on mutual concessions and waiver, but it is not sound when applied to a law which says that it shall be unlawful for the carrier to exact more than the lawful rate, even though the shipper does not object thereto.

If, therefore, it could reasonably be held that the shipping tickets in the case at bar should be treated as substitutes for the bills of lading, which the carrier did in fact issue, the fact that these shipping tickets did not have noted thereon the request of the shipper for the particular cars, and the fact that the carrier furnished a greater capacity car for its own convenience, still this would not entitle the carrier to exact the higher rate.

It certainly can make no difference in this case that the shipping tickets (except the receipt thereupon by the carrier's agent) were prepared by the shipper. It would be unreasonable in any event to contend that the shipper could have the requisite information on which to base the notations required by the tariff rules. It should be observed that among other things, the notations must give the *number of the order* of the particular car. This presupposes that the carrier will keep a record of all cars ordered, and it was shown in this case that such a book was kept by the carrier at its freight depot in Carthage, though this book was not produced nor offered in evidence on the trial. How could the shipper know, without consulting the carrier's books and records what the number of his order was?

Again, it could not be reasonably contended that the shipper would see the carrier's way-bill. If proper notations were made by the carrier on this way-bill, could it be said that the shipper would be deprived of the benefit of the lower rate because, forsooth, the shipping tickets had not contained the proper notation?

Certainly such contention would be unreasonable. But in the case at bar, *the plaintiff in error offered no evidence whatever of the contents of the carrier's way-bill, and made no effort to show that the proper notations were not contained thereon.*

Surely it was incumbent upon the plaintiff in error, even under its own theory to show affirmatively that the proper notations were *not* made on the way-bill. Par-

ticularly is this true when the plaintiff's evidence proved the *fact* of the request for the smaller cars each time a car was ordered, and the further *fact* that the larger capacity cars were furnished for the convenience of the carrier.

Surely the plaintiff in error failed in its proof, and the trial court was justified in exacting this proof before submitting to the jury the plaintiff's claim.

Furthermore we insist that the duty to make the proper notations on the records of the carrier was a continuing duty, which if the facts justified its performance at the time of the shipment could be performed by the carrier within a reasonable time thereafter, on the attention of the carrier being called to the fact that the requisite notations justified by the facts had been omitted from its way-bills or bills of lading.

Surely the mere manual work of making the notations cannot be regarded as the thing which entitles the shipper to the lower rate. If such be the case, then if notations be made on the bill of lading and carrier's way-bill, though not justified by previous request, and by the facts, the shipper could bind the carrier to the collection of the lower rate only, though in fact he ought not to have been allowed such lower rate.

Surely the plaintiff in error would not wish to concede that by collusion between shipper and its agent, entries could be made on the carrier's bills of lading which would justify the shipper in claiming a lower rate than what the real facts entitled the carrier to collect.

But such would be the logic of its position if its contention in the case at bar be upheld that *the notation* and not the *fact of the request* for the smaller car determined the rate.

As we have clearly shown in the previous pages of our brief, the carrier retained in the instant case, the full amount of freight to which it was entitled, based on the actual weight of each shipment at 27½c per hundred weight. This was the rate regularly published and offered by the carrier to the shipper, and under which the shipment was made. Certainly the carrier ought not to plead its own default and make this the basis for claiming more. But after the freight had been collected according to the higher rate, the shipper promptly presented its claim for an overcharge, which it must be conceded it was unjust that it should have been required to pay. The commercial agent of the plaintiff in error, the one man expert in the tariff rules, went to the point of shipment, examined fully into all the facts, heard the statements of the shipper and the agent of the carrier, saw the carrier's books, records and papers (which this court and the trial court, by the act of plaintiff in error has not been permitted to see for some reason best known to counsel for plaintiff in error), and determined that there had been in fact an overcharge. This overcharge was promptly refunded; both parties acting in entire good faith.

We insist that the refund was binding; that the conduct of the carrier in promptly making this refund

was commendable but that its claim for the return of this money and for more freight thereafter made in this action, was not based on law or good morals, and was properly denied by each of the previous courts to which the case was submitted.

We respectfuly submit that viewing the case from any angle the judgment in the trial court and in the Court of Appeals was for the right party, and should be affirmed by this court.

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